IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1277

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., and WESTWARD SHIPPING, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners A. L. Burbank & Co., Ltd., Bank of Tokyo, Ltd., and Westward Shipping, Ltd., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 22, 1975.

Opinions Below

The opinion of the Court of Appeals, which is officially reported at 525 F.2d 9 (1975), is reprinted as Appendix A annexed hereto. The opinion of the United States District Court for the Southern District of New York, which is unreported, is reprinted as Appendix B annexed hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on October 22, 1975. A timely petition for rehearing and a hearing en banc was denied on December 23, 1975 (Appendix C annexed hereto). On January 8, 1976 and on February 6, 1976, orders were entered by the Court of Appeals staying issuance of its mandate pending application to this Court for a writ of certiorari until March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Has the Court of Appeals, in interpreting the Tax Treaty between the United States and Canada in direct conflict with Canada's own interpretation of that Treaty, usurped the Senate's constitutional function by effectively rewriting this and eighteen other tax treaties between the United States and foreign countries?
2. Was the Court of Appeals correct in holding that the Internal Revenue Code, which permits the Internal Revenue Service's issuance of compulsory process to determine the liability of any person "for any internal revenue tax", also grants an Internal Revenue Service agent the power to issue compulsory process to ascertain the tax liability of a non-resident foreign citizen to a foreign power, or to assist a foreign power in ascertaining the correct liability of a citizen of that foreign power to it, where there is admittedly no tax liability of the nonresident foreign citizen to the United States and admittedly no United States interest in any such liability?
3. Did the Court of Appeals, in arriving at its decision, rely upon factual assertions contained in the Government's appellate brief which were and are completely unsupported in the record?
4. Did the Court of Appeals, in holding that a United States District Court has no discretionary power to permit intervention by a taxpayer in a summons enforcement proceeding where the taxpayer proves to the District Court's satisfaction that the summonses have been illegally issued, misinterpret this Court's opinion in *Donaldson* v. *United States*, 400 U.S. 517 (1971)?

Treaty, Statutory and Regulatory Provisions Involved

Income Tax Convention With Canada (1942), 56 U.S. Statutes at Large 1399

Article XIX:

"With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under

its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates."

Article XXI:

"1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

"2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada."

Internal Revenue Code of 1954

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424 (d) (2), 6427(e) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers,

records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Treasury Regulations

§ 519.118, T.D. 5206, 1943 Cum.Bull. 526, 542

Reciprocal administrative assistance.—

(a) By Article XIX of the convention, the United States and Canada adopt the principle of exchange of information for use in the determination and assessment of the taxes with which the convention is concerned. See § 519.117. Pursuant to such principle, every United States withholding agent shall make and file with the collector, in duplicate, an information return on Form 1042B, for the calendar year 1942 and each subsequent calendar year, in addition to withholding return, Form 1042, with respect to the items of income from which a tax of

15 percent was withheld from persons whose addresses are in Canada (5 percent in case of dividends falling within the scope of paragraph 2 of Article XI of the convention). There shall be reported on Form 1042B not only such items of income listed on Form 1042, but also such items of interest listed on monthly returns, Form 1012, including items of interest where the liability for withholding is only 2 percent.

(b) The information and correspondence relative to exchange of information may be transmitted directly by the Commissioner to the Minister.

§ 519.120

Information in specific cases.—Under the provisions of Article XXI of the convention and upon request of the Minister, the Commissioner may furnish to the Minister any information available to, or obtainable by, the Commissioner under the revenue laws relative to the tax liability of any person (whether or not a citizen or resident of Canada) under the revenue laws of Canada.

Statement of the Case

A. The Applicable Facts

On November 23, 1971, a special agent of the Internal Revenue Service (hereinafter "IRS") issued a summons to Bank of Tokyo, Ltd. (hereinafter "Bank of Tokyo") "In the matter of the tax liability of Westward Shipping, Ltd." for the years 1968 through 1970, calling for testimony and production of various books and records of Bank of Tokyo. On December 10, 1971, the special agent

issued a second summons, to A. L. Burbank & Co., Ltd. (hereinafter "Burbank") "In the matter of the tax liability of Westward Shipping, Ltd., British Columbia, Canada" for the years 1968 through 1970, calling for testimony and production of books and records of Burbank. The Burbank summons contained the notation: "For Information Required Pursuant to the Provisions of the Income Tax Treaty Between Canada and the United States"; the summons to Bank of Tokyo contained no notation indicating that the summons had been issued with respect to any country's tax interest other than the United States' (A*72a, 73a).

Westward Shipping, Ltd. (hereinafter "Westward"), a Canadian corporation, was not and is not a United States taxpayer or resident, and was not and is not engaged in any transaction which would subject it to any United States tax. The Canadian authorities had requested the United States authorities to furnish the information sought by the summonses in respect of the liability of Westward for Canadian taxes. As the Government eventually conceded in the Court below (after having taken a contrary position, see *infra,* p. 11), the only tax interest in Westward was that of the Canadian Government, and the United States Government had no tax interest whatever in Westward (A77, 78, 146-148a).

Following issuance of these two summonses, Westward, through counsel, notified Burbank and Bank of Tokyo that Westward deemed the summonses invalid as an improper attempt to compel disclosure of information from the books and records of a United States resident company solely for the benefit of a foreign power and not in aid

* The letters "A a" separated by a number designates page reference to Petitioners' Appendix in the Court of Appeals.

of any tax liability to the United States, and that the IRS had no such power under the United States Code or under the Tax Treaty between the United States and Canada. Accordingly, Westward demanded that Burbank and Bank of Tokyo not comply with the summonses until the IRS ruled upon written objections made by Westward (A78a). Westward, through counsel, filed such written objections with the IRS on December 22, 1971, stating that Westward deemed the summonses to be illegal, unauthorized and unenforceable, on the grounds that neither the Internal Revenue Code nor the Income Tax Treaty between Canada and the United States authorized issuance of any such summonses by the IRS in aid of a Canadian investigation of the tax liability to Canada of a Canadian company which was neither a United States taxpayer nor liable for United States taxes (A78-79, 89-93a).

For a period of approximately one year after Westward filed its written objections with the IRS, the IRS apparently considered Westward's objections sufficiently well-taken that the matter lay dormant and the IRS took no steps to attempt to obtain judicial enforcement of the summonses.* Then, on November 14, 1972, rather than seek judicial enforcement of these two summonses, the IRS instead issued a third summons, to Burbank, purportedly "In the matter of the tax liability of A. L. Burbank & Company, Ltd.", covering, *inter alia,* the same books and records for two of the three years covered in the first summons that had been issued to Burbank (A13, 79a).

Westward thereafter obtained in the United States District Court for the Southern District of New York an or-

* Provision for such judicial enforcement is contained in 26 U.S.C. §7604.

der to show cause which stayed Burbank from complying with the second summons, and stayed the IRS from proceeding with its proposed examination of Burbank, pending a determination on Westward's application for an order quashing the second summons to Burbank. Westward's position with respect to this second summons issued to Burbank was that it was patently a mere subterfuge by the IRS to attempt to avoid Westward's objections to the original summonses issued by the IRS to Burbank and Bank of Tokyo, as it called for Burbank's books and records for two of the three years covered by the first summons, and changed only the designation of the party whose purported tax liability was allegedly under consideration on the summons from "Westward" to "Burbank". On January 9, 1973, the adjourned return date of that order to show cause, an order was duly entered on consent of all parties, which provided for (a) a continuation of the stay against Burbank until any application made by the Government to enforce the second summons against Burbank was determined by the Court, and (b) a vacatur of the stay against the IRS without prejudice to Westward's right to move to intervene in any enforcement proceeding by the Government attempting to enforce the second summons against Burbank (A61-62a).

In the more than three years that have intervened since the Government's issuance of that second summons to Burbank, which Westward had claimed was a subterfuge, the Government has never attempted to enforce it. Nor has the Government ever disputed that the second summons to Burbank was in fact a subterfuge.

Instead of attempting to enforce the second summons to Burbank, the Government on August 28, 1973 moved in the United States District Court for the Southern District of New York by order to show cause for an order

enforcing the summonses that had been issued to Burbank and Bank of Tokyo in November and December of 1971. Westward moved to intervene. This was the first attempt by the Government—made 21 months after Westward had filed its objections with the IRS to those summonses—to attempt to enforce them; after Westward's objections to the IRS' issuance of the summonses had been made, the IRS had chosen instead to issue the second summons to Burbank, which has lain dormant since the Order of January 9, 1973 continuing the stay against Burbank (A63-73a).

In its affidavits and in its oral argument in the District Court in support of its application for enforcement of the two summonses that had been issued in 1971, the Government represented that the summonses were issued in respect of Westward's tax liability to the United States as well as to Canada (A67, 197, 198, 202-203a). Indeed, the Government stated to the Court that IRS officials would "testify they have a legitimate interest in inquiring into Westward's tax liability in the United States", and that "we will obtain affidavits from the appropriate officials within the IRS who entertained, in their own view, the legitimate interests of the United States taxes" (A198, 202-203a). However, when the District Court indicated to Government counsel that such a showing by the Government would be required to establish that the United States did in fact have an interest in Westward's potential tax liability to the United States, the Government completely retracted its position. The day after making its above-quoted representations concerning an alleged United States tax interest in Westward, Government counsel and counsel for Westward entered into the following stipulation:

> "For the purpose of this proceeding to enforce the two Internal Revenue Service summonses an-

nexed hereto as Exhibit A and B against the respondents A. L. Burbank & Co., Ltd. and Bank of Tokyo, Ltd., it is hereby

"STIPULATED AND AGREED by and between the attorney for the United States of America and the attorney for Westward Shipping, Ltd., that:

"1. The United States of America withdraws its claim to enforce said two summonses by reason of any interest by the Internal Revenue Service in respect of the United States tax liabilities of Westward Shipping, Ltd.

"2. The United States of America seeks to enforce said two summonses solely pursuant to the Tax Treaty between the United States and Canada.

"3. The Canadian taxing authorities requested the Internal Revenue Service to obtain the information set forth in said two summonses in respect of the Canadian investigation of Canadian tax liabilities of Westward Shipping, Ltd.

"4. As a result of the request by the Canadian taxing authorities, the Internal Revenue Service issued said two summonses.

"5. Westward Shipping, Ltd. solely for the purpose of this proceeding and for no other makes no claim that the information sought to be obtained as set forth in said two summonses is irrelevant to the investigation by the Canadian taxing authorities in respect to the Canadian tax liabilities of Westward Shipping, Ltd.

Dated: New York, New York

February 21, 1974." (A146-148a)

Thus, despite its previous unequivocal assertions that the United States had a tax interest in Westward and despite its attempt to enforce the two summonses based upon this purported United States tax interest in Westward, the Government finally conceded that the summonses had been issued solely at the request of the Canadian taxing authorities and that the United States Government was not attempting to enforce the two summonses by reason of any United States interest in respect of any alleged tax liability of Westward to the United States. Indeed, as the Court of Appeals' opinion states, the Government eventually conceded that the two summonses had been issued "solely for a Canadian tax investigation where there is no United States interest in the investigation and no claim that United States income taxes are potentially due and owing" (525 F.2d at 11).

The Government's actions as described above, in not attempting to enforce the two summonses here at issue but issuing instead the sham second summons to Burbank, and in claiming to have a United States tax interest in Westward and then withdrawing that assertion when forced to the proof, are probative of the Government's own recognition that neither the Treaty between the United States and Canada nor Section 7602 of the Internal Revenue Code permitted these two summonses to be issued without a legitimate United States tax interest in Westward.

In the enforcement proceedings in the District Court, enforcement was opposed by Burbank and Bank of Tokyo, the two subjects of the summonses, and Westward moved to intervene and object to enforcement. On July 31, 1974, the District Court, in an opinion by the Hon. Thomas P. Griesa, denied and dismissed the Government's petition for enforcement of the two summonses, and denied West-

ward's motion to intervene. The Court of Appeals reversed the District Court's denial and dismissal of the Government's petition, and affirmed the District Court's denial of Westward's motion to intervene.

B. The Decisions Below

The sole power of an IRS agent to issue compulsory process is contained in Section 7602 of Title 26, United States Code, which provides for the issuance of summonses only "for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability. . . ." An IRS agent's power to issue a summons is derived solely from this statute. *United States* v. *Powell,* 379 U.S. 48 (1946).

The Tax Treaty of 1942 between the United States and Canada contains the following provision regarding the exchange of information between the two countries:

> "With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates." (Article XIX)
>
> "If the [Canadian] Minister [of National Revenue] in the determination of the income tax liabili-

> ty of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the [United States] Commissioner [of Internal Revenue], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." (Article XXI)

Thus, the Treaty does not authorize the United States to furnish to Canada *all* information requested by Canada, but only information relevant to "the assessment of the taxes to which this Convention relates", and which the United States (1) has at its disposal, or (2) is "in a position to obtain under its revenue laws." The Government asserted that the information sought by the summonses was not "at the disposal" of the IRS, and attempted to justify the summonses' issuance on the purported grounds that the United States was allegedly "in a position to obtain under its revenue laws" such information. The issue below was therefore whether the United States Government was in a position to obtain, under United States revenue laws, the information requested by Canada.

The District Court held that the relation between the Tax Treaty and 26 U.S.C. §7602 is as follows:

> "The Treaty provides that the United States government will furnish to the Canadian government whatever information the United States can obtain under its laws. 26 U.S.C. §7602 specifies what the United States government can obtain under United States law." (Appendix B, p. 27a)

Thus, the District Court held that the compulsory process provided for under Section 7602 can be used only

for a proper purpose set forth in Section 7602; that such a proper purpose exists under the plain language of Section 7602 only if there is a United States tax interest; and because the Government had ultimately conceded the absence of any United States tax interest, compulsory process would not lie under Section 7602. Therefore, the District Court held, the IRS was not "in a position to obtain under [United States] revenue laws" the information called for in the summonses, and was therefore not obligated or authorized by the tax treaty to furnish such information to Canada. The Circuit Court, while agreeing that "the opinion below properly observed that the Treaty provides no independent compulsory process but depend[s] instead upon the provisions of the Code" (525 F.2d at 12), reversed on the ground that the District Court erred in construing the summons power under 26 U.S.C. §7602 as limited "only to a [potential] tax liability under the *United States* internal revenue laws." (525 F. 2d at 13 (emphasis in original); see also 525 F.2d at 13).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has interpreted an important provision of the Tax Treaty between the United States and Canada in a manner which directly conflicts with Canada's interpretation of that treaty; and this conflict will affect tax treaties between the United States and eighteen other countries.

After the filing of the notice of appeal in this case, petitioners obtained a copy of an Internal Revenue Manual which had been promulgated by the IRS but whose contents had not been disclosed by the Government to the District Court. The Internal Revenue Manual contains the following instruction to all special agents of the IRS who wish to request information from the Canadian Government under said Treaty:

> "It is also essential that the request:
>
> (a) *Provide adequate background to support a Canadian tax interest, because Canadian tax authorities are authorized to furnish only that information which they can obtain under the revenue laws of Canada;* (emphasis added)
>
> (b) Demonstrate sufficient United States tax interest to justify the request. . . ."

Thus, the Internal Revenue Service has explicitly recognized that Canadian tax authorities will furnish to the United States under said Treaty only information which is obtainable under internal Canadian tax law, and that the Canadian authorities will not supply any information unless there is a Canadian tax interest. The position

espoused in this case by the Government, and adopted by the Court of Appeals—that the United States may furnish information to Canada and the IRS may use its summons power to do so even where there is no United States tax interest—directly conflicts with the Canadian position as recognized in said IRS Manual. Petitioners respectfully submit that this direct conflict between the Court of Appeals' decision and the interpretation of the Treaty by Canada, the United States' tax partner, warrants review by this Court. The President, in presenting the Tax Treaty to Congress for ratification, enclosed a letter from the Acting Secretary of State stating that information would be exchanged under the Treaty "upon a reciprocal basis."*

The importance of the conflict between Canada's interpretation of the Tax Treaty and the Court of Appeals' interpretation is highlighted by that conflict's impact not only on the United States-Canada Tax Treaty but on tax treaties between the United States and a multitude of other countries. As the Court of Appeals recognized, there are, in addition to the United States-Canada Tax Treaty, "also some eighteen other United States income tax conventions which have comparable exchange of information procedures." (525 F.2d at 13). The Government itself advised the Court of Appeals that "the issue presented here involves not only the Canadian Tax Convention but will virtually affect its [i.e., the United States'] entire tax treaty structure."**

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* Sen.Exec. B., 77th Cong., 2d Sess., pp. 2, 4-5 (1 Leg.Hist. of Tax Conv. 446, 448-449).

** See Government's "Brief as Cross-Appellee and Reply Brief as Appellant", p. 14.

As the Court of Appeals noted, "th[is] case is one of first impression in this country" (525 F.2d at 11). As the only judicial authority on an issue whose importance in the international tax arena was recognized by the Government and by the Court of Appeals this case vitally affects the United States' international tax relations not only with Canada but also with eighteen other countries.

The irreconcilability of the conflict between the Court of Appeals and Canada is highlighted by the Circuit Court's reliance upon this Court's holding in *Charlton* v. *Kelly*, 229 U.S. 447 (1913) (see 525 F.2d at 15). Relying upon *Charlton*, the Court of Appeals held that "the Canadian interpretation [of the Treaty], even if it be at odds with that of the United States, is not relevant here", on the grounds that the United States has the option to comply with a treaty even where its treaty partner takes a position which the United States regards as not in compliance with the Treaty. The Circuit Court's opinion is in effect a holding that Canada, in interpreting the Treaty as it does, has adopted a policy violative of the purpose of the Treaty—even though Canada, as acknowledged in the IRS Manual, claims a contrary intention insofar as the exchange of information is concerned. The Court of Appeals' holding, if permitted to stand, will have an enormous impact on the United States' international tax relations: it would, in practical effect, permit judicial addition to this and eighteen other treaties of exchange of information provisions not contemplated by any of those treaty partners. Nothing in the record below indicates that any of the United States' eighteen other tax treaty partners is in accord with the position adopted by the IRS in this case or with the Circuit Court's holding, or in disagreement with Canada's position.

Petitioners respectfully submit that where, as here, the Circuit Court has held that a treaty partner of the United States has misinterpreted the treaty, where the Court's opinion has the practical effect of adding a power to the treaty which the United States' treaty partner is of the opinion was not agreed upon or granted, and where the decision will have a significant impact on treaties which the United States has entered into with eighteen other countries, including the addition by judicial fiat* of a power of compulsory process to each of those treaties where none was intended by either the treaty partners or the Senate, the conflict between the Circuit Court's interpretation and Canada's interpretation is of such importance as to merit review and resolution by this Court.

2. The Court of Appeals has improperly added a summons power to the Internal Revenue Code which Congress, in enacting the Code, did not include; which would render 26 U.S.C. §7602 unconstitutional; and which conflicts with opinions of this Court and other Circuits.

This Court has held that the statutory right to issue compulsory process should be strictly construed. "The subpoena power 'is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer.'" *United States* v. *Minker,* 350 U.S. 179, 185 (1956); see

* The correct procedure for revision of the Treaty, rather than a judicial rewriting of the Treaty, would be for Canada and the United States to enter into a supplementary convention—a procedure which the United States and Canada have themselves followed with respect to the very treaty here at issue in 1950, 1956 and 1966. See, e.g., CCH Tax Treaties, ¶¶ 1262, 1262A, 1263, 1264, 1265, and 1266.

also *Cudahy Packing Co. of La.* v. *Holland,* 315 U.S. 357 (1942).

The Court of Appeals held that the power of an IRS agent to issue compulsory process solely in aid of a Canadian tax investigation, where there is no United States tax interest, is contained not in the Tax Treaty but in 26 U.S.C. §7602. As the Court of Appeals' opinion states,

> "The opinion below properly observed that the Treaty provides no independent compulsory process but depended instead on the provisions of the Code." (525 F.2d at 12).

The power to issue summonses solely in aid of a foreign tax investigation when there is concededly no potential United States tax interest is found by the Court of Appeals in the provision of Section 7602 providing for the issuance of summonses to determine liability "for any internal revenue tax". The Court of Appeals' opinion states that the District Court erred in construing that phrase as limited "only to a tax liability under the *United States* internal revenue laws" (525 F.2d at 13; (emphasis in original)). It is respectfully submitted that the Court's opinion, in interpreting this phrase in Section §7602 to include tax liabilities under *foreign* "internal revenue laws", errs for the following reasons and would, if permitted to stand, grant a power to IRS agents which would effectively convert them into tax policemen for the world,* a power not granted by Congress in enacting the

* As early as 1927, in the "Report Presented to the Financial Committee of the League of Nations by the Committee of Technical Experts on Double Taxation and Tax Evasion" (4 Legisl. History of Tax Conventions, p. 4180), the international community was cautioned against this danger: "The meeting realized . . . that it must avoid the risk of the Draft Convention appearing in some quarters as an extension beyond national frontiers of an organized system of fiscal inquisition."

Code, not permitted under the United States Constitution, and not sanctioned by the Senate in passing on the Treaty.

At the outset, it should be noted that not even the Government asserted in the District Court that the phrase "internal revenue tax" in 26 U.S.C. §7602 means other than a United States tax.* Indeed, any tax of a foreign country would not be, with respect to the United States, an *internal* revenue tax, but, rather, the revenue tax of a foreign country.

It is respectfully submitted that the Circuit Court's holding that a right of compulsory process was granted to IRS agents under 26 U.S.C. §7602 to inquire into tax liabilities under foreign revenue laws where there is no United States interest in taxes allegedly or possibly due and owing to the United States is tantamount to making the IRS a tax policeman for the world. Because the Circuit Court's opinion holds that issuance of the summonses in this case was authorized under the Internal Revenue Code, then any country, whether or not the United States has a tax treaty with it, may request information from the United States relating to taxes allegedly due and owing to that country but not relating to any tax interest of the United States, and compulsory process under Section 7602 would be authorized. If, as the Court of Appeals' opinion concedes, the Tax Treaty provides no independent compulsory process but the power of compulsory process is to be found in the Internal Revenue Code, then that provision in the Code would be equally applicable to countries with whom the United States does not have any tax treaty.

* See Appendix B, at p. 26a. Indeed, as previously indicated the Government's actions in this case were, in two significant respects, tantamount to a concession by the Government of the invalidity of the two summonses: (1) the Government permitted both summonses to lay dormant for nearly two years before seeking their enforcement, engaging instead in the subterfuge of the second, sham summons to Burbank (see pages 9-10, *supra*), and (2) Government counsel in the District Court stated, in affidavits and oral argument, that the tax liabilities of Westward in respect of which the summonses were issued included Westward's tax liabilities to the United States—an assertion the Government withdrew when the District Court insisted that the assertion be proved and not merely alleged.

26 U.S.C. §7602 defines and limits the scope of the summons power of the IRS to the ascertainment of liability for United States taxes. *Reisman* v. *Caplin*, 375 U.S. 440, 445 (1964); *Donaldson* v. *United States*, 400 U.S. 517 (1971); *United States* v. *Bisceglia*, 420 U.S. 141 (1975); *United States* v. *Powell, supra*. The right of an Internal Revenue agent to issue compulsory process is completely statutory and in order to obtain the relief granted by the statute he must bring himself within the terms thereof. *United States* v. *Powell, supra*. The statute grants no power to an IRS agent to utilize the summons power to ascertain the correctness of tax liability owed by a non-resident to a foreign power, or to assist or aid any foreign power in ascertaining the correct tax liability of any citizen to that foreign power when there is no potential United States tax liability of the non-resident foreign citizen, and no United States interest in respect of any alleged tax liability to the United States, as in the instant case.

The decision of the Court of Appeals is the only reported decision ever to hold that Section 7602 grants an IRS agent the power to issue compulsory process with respect to the tax liability of a non-resident to a foreign power in the conceded absence of even a potential United States tax liability. As such, the Circuit Court's opinion conflicts with a unanimous multitude of opinions by this and other courts which require, as a predicate for enforce-

ment of an IRS summons, a legitimate IRS interest in taxes owed or potentially owed to the United States; see, *e.g., United States* v. *Bisceglia, supra; United States* v. *Powell, supra; Foster* v. *United States,* 265 F.2d 183 (2d Cir. 1959), cert. denied 360 U.S. 912 (1959); *United States* v. *Harrington,* 388 F.2d 520 (2d Cir. 1968); *United States* v. *Egenberg,* 443 F.2d 512 (3d Cir. 1971); 50 N.Y.U. L.Rev. 177, 182-195 (1975); cf. *United States* v. *Humble Oil & Refining Co.,* 488 F.2d 953 (5th Cir. 1974), v. 421 U.S. 943 (1975), aff'd 518 F.2d 747 (5th Cir. 1975); *United States* v. *Matras,* 487 F.2d 1271 (8th Cir. 1973).

Moreover, the Court of Appeals' decision, in reading into Section 7602 the power to issue compulsory process in aid solely of a tax investigation of a foreign country with respect to taxes due and owing to only that foreign country, has added an unconstitutional gloss to Section 7602. The constitutional basis for enactment of the summons power by Congress is found in the power granted to Congress under Article 1, Section 8, of the Constitution "to lay and collect taxes . . . of the United States". Nothing in the Constitution grants Congress the power to permit the IRS to issue compulsory process for the ascertainment of taxes due from a foreign citizen to a foreign country where no United States potential tax liability exists. If Congress in enacting Section 7602 purported to grant such power in the statute, such an enactment would have been clearly unconstitutional. It is respectfully submitted that Congress did not do so in Section 7602. Any such power of an IRS agent to issue compulsory process solely in aid of a foreign country's tax investigation might be constitutionally permissible only if granted by treaty, concurred in by a two-thirds majority of the Senate pursuant to the treaty provision under Article 2, Section 2, of the United States Constitution—but that question is not involved here because the Court

of Appeals' decision acknowledges that the United States-Canada Treaty grants no such power. The Circuit Court's acknowledgment is plainly correct: the Treaty merely authorizes either contracting state under certain circumstances to furnish to the other state information which the requested state is "in a position to obtain under its revenue laws". For the reasons discussed above, the IRS is not authorized to issue compulsory process under United States revenue laws (i.e., under 26 U.S.C. §7602) solely to obtain information for a foreign country with respect to the potential tax liability to only the foreign power and not to the United States, and is therefore not "in a position to obtain under its revenue laws" the material sought in the two summonses at issue.

Thus, as the District Court held, 26 U.S.C. §7602 is not inconsistent with the Treaty; rather, the Treaty provides for the furnishing by the IRS of information obtainable by the IRS under this country's domestic law, and this country's domestic law with respect to the summons power is defined and limited in 26 U.S.C. §7602.

Although the Court of Appeals, as previously noted found the power to issue summonses in the Code and not in the Treaty, it should also be noted that at no time during the course of Senate hearings on the Treaty was the Senate ever advised that the Treaty it would be voting on was intended or would be interpreted to confer upon the IRS the power to issue compulsory process solely in aid of a tax investigation of a foreign country. Significantly, the exchange of information provision of the United States-Canada tax treaty is substantially similar to that of the United States-France tax treaty (see letter submitted by the Secretary of State to the President regarding the United States-France Treaty, CCH Tax Treaties, ¶ 2872). At the Senate Committee hearing pre-

ceding ratification of the tax treaty between the United States and France, the representative of the Department of Treasury* stated with reference to the collection provisions as follows:

> "** * * the United States undertakes to collect taxes for France * * * and, as a part of such procedure, to conserve the assets as provided in its laws for the enforcement of its own taxes. Leading statutory provisions in the United States Code on this subject are: Sections 272, 274, 3640, 3651, 3655, 3670, 3672, 3678, 3690, 3692, 3693, 3700, 3701, 3740, 3744, and 3748. Such sections extend all the way from methods for distraint and sale of property to a claim in a bankruptcy proceeding."**

Significantly, no mention is made of either Section 3615 or Section 3654 of the 1939 Code, which were the applicable summons provisions of the Internal Revenue Code regarding collections. This illustrates again the absence of any legislative intent to permit use of the summons power to merely assist the taxation authorities of a foreign country.

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* The Treasury Regulations issued by the Treasury Department with respect to Articles XIX and XXI of the Treaty are devoid of any suggestion that the Treaty itself confers any power to issue compulsory process, or that any such power can be found beyond the power defined in 26 U.S.C. §7602. See Treasury Regulations §519.120, T.D. 5206, 1943 Cum.Bull. 526, 542.

Senate, 80th Cong., 1st Sess., p. 18.

** Hearings before Subcommittee on Foreign Relations, U. S.

3. The Court of Appeals' decision, in relying upon factual assertions contained in the government's appellate brief but not supported by the record, conflicts with the applicable standard for appellate review set forth by this Court and by other federal Courts of Appeals.

It is a well-established principle of appellate review that an appellate court will consider only facts supported by the record and not mere factual assertions contained in an appellate litigant's brief. This rule has been set forth by this Court (see, *e.g.*, *Schley* v. *Pullman's Palace Car Co.*, 120 U.S. 575 (1887); *Thomson* v. *Gaskill*, 315 U.S. 442 (1942); *Curtis Publishing Co.* v. *Butts*, 338 U.S. 130, 144 (1967)) and, with the apparent sole exception of the instant case, by all federal courts of appeals which have considered the issue (see, *e.g.*, *Bono* v. *United States*, 113 F.2d 724, 725 (2d Cir. 1940); *United States* v. *Addonizio*, 449 F.2d 100, 103 (3d Cir. 1971), cert. denied, 404 U.S. 1058; *United States* v. *Anderson*, 481 F.2d 685, 702 (4th Cir. 1973), aff'd, 94 S.Ct. 2253; *Brookins* v. *United States*, 397 F.2d 261, 262 (5th Cir.), cert. denied *sub nom*, *Houston* v. *United States*, 393 U.S. 952, 89 S.Ct. 377, 21 L.Ed.2d 364 (1968); *Chesapeake & O. Ry. Co.* v. *Greenup County, Ky.*, 175 F.2d 169, 171 (6th Cir. 1949); *Tanner* v. *United States*, 401 F.2d 281, 288 (8th Cir. 1968); *Duran* v. *United States*, 413 F.2d 596, 605 (9th Cir.), cert. denied 396 U.S. 917, 80 S.Ct. 239, 24 L.Ed.2d 195 (1969).

Notwithstanding this unbroken line of judicial authority, the Court of Appeals' decision in the instant case relies principally on the following three factors, each of which is completely unsupported in the record:

A. The Internal Revenue Manual

As previously noted (supra, pages 17-18), petitioners advised the Court of Appeals that they learned of an Internal Revenue Manual whose existence was not disclosed by the Government in the District Court and in which the IRS had recognized that under Canada's own interpretation of the Tax Treaty, the information sought by the summonses at issue did not fall within the ambit of the Treaty because there was no tax interest in the country to whom the request for information was made—i.e., the United States.

In response to this contention, the Court of Appeals' opinion states that "the Government concedes that this represents IRS' understanding of the Canadian position as the result of conversations between IRS representatives and the Canadian Ministry of National Revenue between 1960 and 1962." (525 F.2d at 15) The Court's opinion then states that "nothing in the record . . . establish[es] that this is the official Canadian construction of the Treaty" (525 F.2d at 15). However, this is a result of the fact that nothing whatsoever exists in the record with respect to the Internal Revenue Manual because the Government simply did not disclose its existence to the District Court.* Thus, nothing in the record appears with respect to these asserted "conversations" between the two countries' representatives; and nothing in the record suggests that this is not the "official" Canadian construction

* Indeed, prior to petitioners' obtaining of the Manual and providing the relevant provision to the Court of Appeals, the Government had asserted, in its appellate brief (at p. 22 thereof), "In making its request here, the Canadian Government believed that the Treaty empowered the Service to use its summons authority to obtain the requested information solely in connection with a Canadian tax liability."

of the Treaty: these assertions are contained only in the Government's appellate brief.

The Court of Appeals' opinion then states that even if the statement of Canada's interpretation of the Treaty as contained in the Internal Revenue Manual does reflect the "official" Canadian position, that fact would be irrelevant because although that may be Canada's interpretation of the Treaty,

> "It may represent the Canadian view but it does not represent the *American* interpretation. The Government states that the position it takes here, which has been approved by the Office of the Legal Adviser, Department of State, and the Office of International Tax Counsel, Treasury Department, constitutes the interpretation of the Treaty which the United States has consistently maintained. The Government argues that there has been no prior litigation on this point precisely because that position has not been challenged before. Although the appellees are skeptical we see nothing in the record which would contradict this representation made by the Government in its brief and emphasized on the oral argument below." (525 F.2d at 15).

Notwithstanding this statement by the Court, not a word appears in the record as to the alleged approval of the Government's position on this appeal by either the Office of the Legal Adviser of the Department of State or the Office of International Tax Counsel of the Treasury Department; nor does a word appear in the record that the Government has consistently maintained—or, indeed, has ever previously maintained—this position; nor does a word appear in the record that the position advanced by the Government in this matter has not been challenged before. The sole allegations in this regard appear in the

Government's "Brief for the United States as Cross-Appellee" (at p. 14 thereof). That reference in the Government's brief contained no record reference, for the simple reason that there is nothing in the record to support the assertion, which was simply a bare conclusory allegation set forth for the first time in the Government's appellate brief. The Court of Appeals' acceptance as a fact that the IRS has in the past on a consistent basis issued summonses in aid of tax investigations of foreign countries where there was no United States tax interest is completely unsupported in the record which does not reflect a single instance, or even the allegation of a single instance, of the issuance (or enforcement) of any such summons, except for the instant summonses.

B. The OECD Model Treaty

In their brief, petitioners brought to the Court of Appeals' attention that both the United States and Canada are members of the Organization for Economic Cooperation and Development ("OECD") and that both countries have endorsed a Model Tax Treaty whose terms would bar enforcement of the summonses here at issue—and thus, in the Court's words, "both must interpret [the Tax Treaty] consistently with the Model Treaty" (525 F.2d at 16). The Government's brief argued that a revised Commentary (not officially published) to the OECD Model Treaty substantially modified the exchange of information provision of the Model Treaty and, as so modified, supported the Government's position. The Court of Appeals interpreted the revised Commentary as support for the Government's position (see 525 F.2d at 16). However, nothing exists in the record with respect to the OECD Treaty or its revised Commentary. In fact, the revised Commentary upon which the Government, and the Court's

opinion, relied was adopted in January, 1975 (525 F.2d at 16), subsequent to the decision of the District Court and subsequent to the Government's filing of its notice of appeal in this action.

During the course of oral argument of this appeal, one of the members of the panel of the Court of Appeals asked the attorney for the Government whether the Government had secured a revision of the Commentary to help overcome the decision of the District Court in this action. The attorney for the Government answered that he did not know.

No mention of the OECD was made in the District Court; and, of course, nothing appears in the record with respect to the revised Commentary as it had not been promulgated prior to the filing of the notice of appeal in this action. Yet, the Court of Appeals' decision was based in substantial part upon this revised Commentary to the OECD, as to which the record is completely silent in all respects, including whether the United States had sought and obtained revision of the Commentary in response to the District Court's order and as an argument to be raised in its favor on the appeal.

C. The United States' Tax Treaties with Other Countries

As previously noted (Point 1, *supra*), petitioners respectfully submit that the tremendous impact, recognized as such by the Court of Appeals in its decision and by the Government in its appellate briefs, of the Court of Appeals' decision on eighteen similar tax conventions between the United States and other foreign countries warrants this Court's review. In this connection, the Court of Appeals' decision states that the decision of the District Court would, if adopted, "frustrate" the purposes of those

eighteen other tax treaties (525 F.2d at 13). However, nothing is contained in the record below regarding any of these eighteen tax treaties, including their purposes, their interpretations by the contracting countries, the conceivable impact on any of these treaties of alternative interpretations of the exchange-of-information provision in the United States-Canada Tax Treaty, or the intentions of the contracting countires. In fact, not a word appears in the record making any mention of any of these eighteen treaties. Compare Rule 44.1 of the Federal Rules of Civil Procedure. Similarly, the Court of Appeals' statement that these eighteen other treaties "have never been interpreted to our knowledge to eliminate the section 7602 summons power in cases where the tax investigation was unilateral" (525 F.2d at 13-14, n. 2) results from the fact that not a single word appears in the record with respect to these other treaties or whether they have ever been interpreted (by the United States or any other treaty partner) to contain or to exclude the Section 7602 summons power.

Thus, it is respectfully submitted that with respect to all three of the grounds upon which the Court of Appeals' decision is primarily based, not a word, and certainly not a word in support, appears in the record. The Court of Appeals' decision simply accepted as fact unsupported representations contained in the Government's brief before the Court of Appeals without the slightest basis in the record. In their petition for rehearing and a hearing en banc, petitioners urged, *inter alia*, that the Court of Appeals should remand the case to the District Court to take testimony, receive evidence, and make findings of fact with respect to these issues raised for the first time on appeal and as to which the record was (and is) completely barren, but the petition was in all respect denied. Thus, the Court of Appeals' decision was based primarily on considerations that were and are completely devoid of any support in the record, in contravention of the long and unbroken line of judicial authorities set forth above.

4. The Court of Appeals' decision in denying intervention to petitioner Westward, has misinterpreted this Court's opinion in *Donaldson* v. *United States*, 400 U.S. 517 (1971) by establishing a standard of intervention which would strip all District Courts of any discretion to permit intervention where summonses are proved by the prospective intervenor to have been illegally issued; and this standard is in conflict with the standard set forth by other courts.

In seeking leave to intervene, Westward presented facts to the District Court from which the District Court concluded, "I don't have any hesitancy. I think that the subpoenas [sic] are beyond the statutory authority." (A220-221a). This was at a stage of the proceedings where neither Burbank nor Bank of Tokyo, the parties upon whom the summonses had been served, had objected to their enforcement (both Burbank and Bank of Tokyo later did object to their enforcement). The District Court stated:

> "Now so far in this proceeding the only one who has raised any problem about this subpoena is the taxpayer. If the taxpayer had not called problems to my attention I would not know about it; I would simply have granted enforcement and not really realizing that there was any problem about it.
>
> "Certainly the government's original papers indicated that there was a U. S. tax purpose. None of the problems, either factual or legal, would have come to my attention but for the action of Westward here." (A213a)

However, the District Court held, and the Court of Appeals affirmed its holding in this regard, that under this

Court's decision in *Donaldson* v. *United States,* 400 U.S. 517 (1971), it had no discretion to permit Westward to intervene. Thus, the Courts below interpreted this Court's decision in *Donaldson*—mistakenly, petitioners respectfully submit—as barring the District Court from permitting as a matter of discretion a taxpayer to intervene where the taxpayer establishes facts which prove to the District Court's satisfaction that summonses which the District Court is called upon to enforce have been illegally issued, and the District Court is therefore compelled to enforce those summonses notwithstanding the Court's recognition of their illegal issuance. This represents a substantial misinterpretation of this Court's holding in *Donaldson,* and, if permitted to stand, would convert district courts before whom enforcement proceedings are pending into automata without discretion, compelled routinely to enforce summonses recognized by the Court as having been illegally issued.

This Court held in *Donaldson* that a summons will be enforced and intervention denied if the summons "is issued *in good faith* and prior to a recommendation for criminal prosecution." 400 U.S. at 536 (emphasis added); cf. *Couch* v. *United States,* 409 U.S. 322, 326 n. 8 (1973). In the instant case, Westward's application for leave to intervene was accompanied by a factual showing which convinced the District Court that the summonses were completely unauthorized by either the statute or the Tax Treaty. The District Court first stated that it would permit intervention as a matter of discretion based upon its interpretation of this Court's opinion in *Donaldson* that a district court can permit intervention where, as here, the intervenor establishes the invalidity of the summons; but the District Court later concluded, based upon this Court's citation with approval in *Donaldson* of *In Re Cole,* 342 F.2d 5 (2nd Cir. 1965), cert. denied 381 U.S. 950 (1965)

(see 400 U.S. at 530), that the District Court was without any discretionary power (Appendix B, pp. 28a-29a). The Court of Appeals, in affirming the District Court's denial of intervention, also relied upon this Court's citation with approval of *Cole* in *Donaldson.*

Petitioner Westward respectfully submits that the Court of Appeals has completely misinterpreted *Donaldson.* Nothing in *Donaldson* prohibits the District Court from granting intervention in a third party summons enforcement proceeding where the prospective intervenor makes a clear-cut showing that satisfies the District Court that the summons in question was issued without any legal authority. It is respectfully submitted that this Court in *Donaldson,* in citing *Cole* with approval, was approving the holding in *Cole* that a taxpayer may not intervene *as of right* in a summons enforcement proceeding simply because it is the taxpayer's tax liability that is the subject of the summons. But this Court clearly held in *Donaldson* that a District Court may permit intervention as a matter of discretion where a showing is made that the summonses in question had been issued beyond the statutory power. Petitioner Westward does not here assert that a taxpayer has an inflexible right to intervene in enforcement proceedings involving a third party summons, but that the District Court has the discretionary power to permit intervention on a showing that convinces the District Court that the summons in question has been issued without legal authority—a showing which the District Court accepted in this case.

The decision of the Court below, is squarely in conflict with *United States* v. *Lafko,* 520 F.2d 622, 624 (3d Cir. 1975), where intervention was permitted under a taxpayer's claim such as in the instant case that the summons was issued for an improper purpose be-

yond the statutory power under Section 7602, Title 26, U.S.C. The decision below is likewise in conflict with *United States* v. *Friedman,* 388 F.Supp. 963, 966 (W.D. Pa. 1975), and *United States* v. *Northwest Pennsylvania Bk. & Tr. Co.,* 355 F.Supp. 607, 611-613 (W.D.Pa. 1973), which also interpreted *Donaldson* as authority for permitting intervention on a discretionary basis in the District Court. The decision of the Court of Appeals is also in conflict with *United States* v. *Wall Corp.,* 475 F.2d 893, 894 (D.C. Cir. 1972).

Petitioner Westward respectfully submits that this issue is one which merits review and reversal by this Court, as the decision in the Court below would place every district court in the position of being compelled to order enforcement of summonses even where, as here, the district court concludes those summonses were issued without legal authority.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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VICTOR J. HERWITZ
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SUNAO T. A. YAMADA
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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 16, 68, 205, 207—September Term 1975

Argued September 25, 1975 Decided October 22, 1975

Docket Nos. 74-2342, 74-2359, 74-2470, 75-7186

UNITED STATES OF AMERICA,

Petitioner-Appellant,

—against—

A. L. BURBANK & CO., LTD., and BANK OF TOKYO, LTD.,

Respondents-Appellees,

—and—

WESTWARD SHIPPING, LTD.,

Intervenor-Cross-Appellant.

Before:

MOORE, MULLIGAN and VAN GRAAFEILAND,
Circuit Judges

[1a]

Appendix A

Appeal from an order of Hon. Thomas P. Griesa, United States District Judge for the Southern District of New York, denying enforcement of Internal Revenue summonses, and denying a motion to intervene by Westward Shipping, Ltd.

Affirmed in part and reversed in part.

ERNEST J. BROWN, Department of Justice, Washington, D.C. (Scott P. Crampton, Asst. Attorney General; Paul J. Curran, United States Attorney, Southern District of New York, David P. Land, Walter S. Mack, Asst. United States Attorneys; Elmer J. Kelsey, David E. Carmack, Attorneys, Tax Division, Department of Justice, Washington, D.C.), for Petitioner-Appellant.

VICTOR J. HERWITZ, New York, N. Y., for Respondent-Appellee A. L. Burbank & Co., (Sunao T. A. Yamada, New York, N. Y., for Respondent-Appellee Bank of Tokyo).

LOUIS BENDER, New York, New York (Sandor Frankel, of Counsel) for Intervenor-Cross-Appellant.

MULLIGAN, Circuit Judge:

The litigation giving rise to this appeal involves the construction of the Tax Treaty of 1942 ("the Treaty") between the United States and Canada, which provides for cooperation between the two countries in the exchange of information to aid each in conducting tax investigations. Essentially, we are called upon to determine whether the Treaty permits the United States Internal Revenue Service (IRS) to use the summons authority found in the 1954 Internal Revenue Code, 26 U.S.C. § 7602, to obtain in-

Appendix A

formation from American based corporations solely for a Canadian tax investigation where there is no United States interest in the investigation and no claim that United States income taxes are potentially due and owing. The case is one of first impression in this country. The United States District Court, Southern District of New York, Hon. Thomas P. Griesa, in an opinion dated July 31, 1974, held that IRS could not properly utilize its summons authority in this situation and denied the enforcement of the two IRS summonses at issue here. The United States has appealed. We find the appeal to be meritorious and reverse the order below. The court below also denied the application of the Canadian taxpayer, Westward Shipping, Ltd. (Westward), to intervene in the proceedings below. Westward has cross-appealed from this denial of intervention. We affirm the order from which the cross-appeal was taken.

I

The facts here are not in dispute. On November 23, 1971 the IRS issued an administrative summons to the Bank of Tokyo, New York branch (Bank of Toyko), and on December 10, 1971 it issued a similar summons to A. L. Burbank & Co. (Burbank), also located in New York City. Both summonses sought to produce the books and records in the possession of the respective companies which were relevant to the potential tax liability of Westward, a Canadian corporation which is not a United States resident or taxpayer. The summonses were issued by IRS to obtain information which had been requested by Canadian tax authorities who were investigating Westward's possible liability for *Canadian* taxes. In Decem-

ber, 1971 counsel for Westward advised both Bank of Tokyo and Burbank not to comply with the summonses until written objections had been filed by Westward with IRS to contest the disclosure of information solely for the use of a foreign country. Westward filed such written objections with the New York IRS office on December 22, 1971 taking the position that the summonses were illegal, unenforceable and not authorized either under the Code or the Treaty.

On November 14, 1972 IRS, which had not sought enforcement of the summonses, responded instead by issuing a new summons to Burbank which now purported to deal with *Burbank's* domestic tax liability, not Westward's. However it requested the same books and records as the earlier summons. Westward then moved to quash the second summons in the Southern District Court, claiming that it was a subterfuge to accomplish what the earlier and allegedly illegal summonses could not. This proceeding eventually led to a stipulation among the parties which provided for a stay of the summons until such time as the Government should move for its enforcement. The Government did not move to enforce but instead decided to enforce the original summonses in the instant proceeding, which it commenced on August 31, 1973. Both Burbank and the Bank of Tokyo agreed to take no position in the proceeding but Westward moved to intervene. During the proceeding before Judge Griesa the parties again entered into a stipulation whereby *inter alia* the United States withdrew any claim that IRS had any interest in the United States tax liabilities of Westward, and admitted that the Canadian authorities had requested the summonses solely because of a Canadian investigation of Canadian tax liabilities of Westward; Westward in turn agreed that it made no claim that the

material sought to be obtained was irrelevant to the Canadian investigation.

Judge Griesa, after earlier intimations to the contrary, eventually advised Westward that it had no standing to intervene; Burbank and Bank of Tokyo at his suggestion then withdrew their agreement to take no position on the summonses and instead asserted their illegality. Judge Griesa's opinion and order of July 31, 1974 denied enforcement of the summonses and also denied Westward's motion to intervene.

II

It is evident that the issue before us depends upon our construction of the Treaty and section 7602 of the Code. The opinion below properly observed that the Treaty provides no independent compulsory process but depended instead upon the provisions of the Code. Section 7602[1]

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[1] "§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of

(Footnote continued on following page)

in relevant part authorizes the issuance of a summons and the production of books and records to determine the liability of any person "for any internal revenue tax". The court below concluded that this phrase should be construed to refer only to a tax liability under the *United States* internal revenue laws.

> If the IRS has, or may obtain, information pursuant to a legitimate investigation of a party's United States tax liability, it may turn over such information to the Canadian government. But there is no authority either in the treaty or the statute for issuance of an IRS summons *solely* for the purpose of aiding Canadian tax authorities in a Canadian tax investigation.

Op. at 11 (emphasis in original).

We cannot read the statute this narrowly, particularly in view of the broad purposes of the Treaty.

Article XIX of the Treaty provides in pertinent part:

> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish

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(Footnote continued from preceding page)

account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretray or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry".

> to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws insofar as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.
>
> The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

Article XXI provides:

> 1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.
>
> 2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

Our reading of the two articles of the Treaty set forth above (especially Article XIX) makes it abundantly clear

that one purpose of the pact was to provide a means of cooperation between the contracting states whereby information could be exchanged after it was collected through the administrative processes provided by the statutory law of each. The avowed intent was to prevent fiscal evasion. Article XXI explicitly provides that if Canada desires information to determine the liability of any person under Canadian revenue laws, IRS may furnish the same information that it would be entitled to obtain under our Revenue Code. There is nothing in the Treaty to indicate that this procedure could only be applied in a case where there was concurrent tax liability in both states. If there were a tax evasion in either state the procedural tools of the "requested" state (i.e., the state asked to furnish information) were to be employed. It would totally frustrate the convention if we were now to hold that the examination process set forth in our Code is in any event unavailable because it can only be employed if there is an American tax liability. We think the fair reading of the Treaty is that if Canada is investigating the tax liability of one who is potentially delinquent to it, then the United States may utilize the same investigative techniques that it would employ if that person were under investigation here for a domestic tax liability. To do otherwise would negate the very purpose of the Treaty.

The court below construed section 7602 to apply the summons procedure only to the liabilities imposed by the United States Internal Revenue Code. This in our view is a narrow interpretation which would not only frustrate the Canadian Tax Treaty but also some eighteen other United States income tax conventions which have com-

parable exchange of information procedures.[2] It is natural that the Internal Revenue Code refers in section 7602 to liabilities under United States law, since it was written as a United States tax law, but to read it to exclude the use of the very procedures to which the Treaty refers not only thwarts the purpose of the Treaty but also ignores well settled rules of construction.

Upon its ratification the Treaty became part of our law, *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 161 (1940). Moreover it is well understood that treaties are to be broadly construed to enable the intent of the treaty to be enforced.

> According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.
>
> *Bacardi Corp.* v. *Domenech, supra,* 311 U.S. at 163.
>
> Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations

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[2] The other countries with which we have similar conventions are Australia, Austria, Belgium, Denmark, Finland, France, West Germany, Greece, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Sweeden, Trinidad and Tobago, and South Africa. Of course, we are not now called upon to construe these other conventions, but note that they have never been interpreted to our knowledge to eliminate the section 7602 summons power in cases where the tax investigation was unilateral.

> should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. *Laubenheimer,* 290 U.S. 276, 293-94 (1933). Accord, *Jhirad* v. *Ferrandina,* 355 F. Supp. 1155, 1160 (S.D. N.Y.), rev'd on other grounds, 486 F.2d 442 (2d Cir. 1973).

Aside from general principles of construction, section 7852(d) of the 1954 Code, which was enacted after the Treaty in question, provides:

> No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.

Thus even if section 7602 were read as narrowly as the court below did, it would be contrary to the Treaty and therefore not enforceable.

The only authorities cited by the appellees here to support the proposition that the compulsory process provided in section 7602 is limited to a case involving an investigation of delinquent United States taxes, *United States* v. *Powell,* 379 U.S. 48 (1964); *SEC* v. *Wall St. Transcript Corp.,* 422 F.2d 1371 (2d Cir. 1970); *United States* v. *Harrington,* 388 F.2d 520 (2d Cir. 1968) all involve domestic taxpayers and do not involve the articles of the Treaty at issue or any comparable pact. They are

not in point here; as we indicated at the outset, the question before us is one of first impression.

III

The appellees urge that the practical construction of the Treaty by the contracting states must be given great weight in its interpretation. *Kolovrat* v. *Oregon,* 366 U.S. 187, 194 (1961). Appellees emphasize that IRS has promulgated an Internal Revenue Manual, section 9265.2(3) of which directs special agents, in making requests to Canada to obtain information relevant to United States tax evasion, to "[p]rovide adequate background to support a Canadian Tax interest, because *Canadian tax authorities* are authorized to furnish only that information which they can obtain under the revenue laws of Canada" (emphasis added).

The Government concedes that this represents IRS's understanding of the Canadian position as the result of conversations between IRS representatives and the Canadian Ministry of National Revenue between 1960 and 1962. There is nothing in the record however to establish that this is the official Canadian construction of the Treaty but even on the assumption that it is, we do not consider it fatal to appellant's position here. It may represent the Canadian view but it does not represent the *American* interpretation. The Government states that the position it takes here, which has been approved by the Office of the Legal Adviser, Department of State, and the Office of International Tax Counsel, Treasury Department, constitutes the interpretation of the Treaty which the United States has consistently maintained. The Government argues that there has been no prior litigation on this

point precisely because that position has not been challenged before. Although the appelleees are skeptical we see nothing in the record which would contradict this representation made by the Government in its brief and emphasized on the oral argument below.

Appellees argue however that even if the Manual interpretation represents just the Canadian position, if the Treaty purpose was to provide the exchange of information on a reciprocal basis, then the United States should not now be under any greater obligation to furnish information than is the Canadian Government. This contention is at odds with the holding in *Charlton* v. *Kelly,* 229 U.S. 447 (1913). That case involved the extradition by Italy from the United States of an American fugitive who allegedly committed a murder in Italy. The United States had interpreted the word "person" of the applicable extradition treaty with Italy to include all persons who had committed crimes in Italy, including citizens of the United States. Italy on the other hand had refused to surrender its nationals who had committed crimes in the United States. The Court held that although the obligation had ceased to be reciprocal, the United States had the option either to renounce the treaty or to conform to its own obligation as it had construed it. "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect." 229 U.S. at 473.[3] As the Court stated

[3] To circumvent *Charlton,* appellee relied on oral argument upon *Valentine* v. *United States ex rel. Neidecker,* 299 U.S. 5 (1936). We find nothing there which contradicts the holding of *Charlton* v. *Kelly.* The extradition treaty in *Valentine* contained the explicit provision that "[n]either of the contracting Parties shall be bound to deliver up its own citizens," 299 U.S. at 10. The Court therefore found no authority in any statute or in the Treaty to authorize a surrender of the *Valentine* respondents.

in *Factor* v. *Laubenheimer, supra,* 290 U.S. at 298: "Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to it holds to a different view of its meaning." We conclude then that the Canadian interpretation, even if it be at odds with that of the United States, is not relevant here.

Appellees further point out that both the United States and Canada are members of the Organization for Economic Co-Operation and Development (OECD), established in Paris in December, 1960. The OECD Model Treaty contains an Article 26, entitled "Exchange of Information," which in its paragraph 2[4] and in the Commentary thereto states in substance that no contracting state is to supply to another particulars not obtainable under its laws or in the normal course of the administrative practice of that or the other contracting state. Appellees argue that because the United States and Canada

[4] "2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:

a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public)."

have not amended the bilateral Treaty in question since the passage of the Model Treaty, both must interpret it consistently with the Model Treaty. However, as the Government points out, the Model Treaty's Revised Commentary of January, 1975, ¶¶ 12 and 14, now states:

> 12. This paragraph (Paragraph 2 of the Model Treaty) embodies certain limitations to the main rule in favor of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. *However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized even though invoked solely to provide information to the other Contracting State.* Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article. (Emphasis supplied.)
>
> 14. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, *which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons provided the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect*

> *the information the other State needs in the same way as if its own taxation was involved,* under the proviso mentioned in paragraph 13 above. (Emphasis supplied.)

The appellees urge that the United States intent was to adapt American treaty provisions to those in the Model OECD convention.[5] Assuming this to be true, appellees can find no solace; in fact the new Commentary[6] reinforces the Government's position, which we have adopted here, that American administrative procedures (which in-

---

[5] See the remarks of former Assistant Secretray of the Treasury Stanley Surrey, in Factors affecting United States treasury in conducting international tax treaties, 28 J. Taxation 277 (1968). However, in this article Prof. Surrey does not touch at all upon the exchange-of-information aspect of tax treaties.

[6] At oral argument counsel for appellees attempted to answer the Revised Commentary by citing its paragraph 13, which says:

> Furthermore the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system.

However, we think the word "wider" here refers merely to the internal information-gathering procedures used by each signatory, and does not mean, as appellee would have it, that the requested party cannot be asked to do for the requesting party what the latter would not do for it. Furthermore, paragraphs 12 and 14, quoted in the text, make it quite clear that the Model Treaty contemplates the requested country gathering and furnishing information to the requester even though the former has no use for the information itself.

clude the administrative summonses in issue here) are properly utilized where the purpose is solely to assist the investigation of a Canadian potential tax liability.[7]

---

[7] Both sides further urge on us certain portions of the "legislative history" of the Treaty, which supposedly clarifies the congressional intent. For example, the Government cites a letter from the then-Acting Secretary of State which accompanied the Treaty when it was presented to Congress for ratification; the letter notes that the Treaty was to provide information to each signatory "upon a reciprocal basis", such information to include data about United States taxpayers which is "available in Canada," without mention of a requirement of a concurrent tax investigation in Canada. 1 Leg. Hist. of U.S. Tax Conv. 446, 449 (1962). In the same letter we find the assertion that "the articles of the [Treaty] are in accord with existing revenue laws of the United States. . . ." Id. at 447. Section 7602's predecessors (§§ 3614 and 3615 of the Internal Revenue Code of 1939) were part of the "existing revenue laws of the United States" at the time of the Treaty's ratification; therefore the Acting Secretary's letter would indicate no conflict between the Treaty and the summons provisions of the Code.

Appellee invokes a discussion in Congress during which then-Senator George of Georgia expressed the following opinion: "I do not think there is anything in the convention which would require furnishing information beyond what each Government has the right to ask of its own citizens at the present time. . . . The convention does not undertake to confer upon either the United States or Canada any extra power with respect to inquiries made of the citizens of either country." 88 Cong. Rec. 4714 (1942). However, this is inconclusive: certainly the section 7602 summons power is a "power" the United States can levy on its own citizens; the question is whether it can do so when the only tax investigation is in Canada, and Sen. George's remarks shed no light on that question.

Finally, the Senate floor debate included the following opinion of then-Senator Taft of Ohio:

(Footnote continued on following page)

Finally, we affirm Judge Griesa's order denying Westward the right to intervene. We have held squarely that "[t]he taxpayer, under circumstances where only books, records and other papers belonging to [a] third party are the subject of the summons, has no standing to object to the summons." *Application of Cole,* 342 F.2d 5, 8 (2d Cir.), cert. denied, 381 U.S. 950 (1965). See also *Fifth Avenue Peace Parade Comm.* v. *Gray,* 480 F.2d 326, 332 (2d Cir. 1973). Our holding in *Cole* was cited with approval in *Donaldson* v. *United States,* 400 U.S. 517, 530 (1971). In any event, Westward was not prejudiced by the denial of intervention here, as its counsel admitted on argument of this appeal; it has been allowed to argue its cross-appeal and both Bank of Tokyo and Burbank have adopted its brief.

Affirmed in part and reversed in part.

(Footnote continued from preceding page)

> In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the [Treaty] would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.
>
> Mr. George. It does provide for exchange of information, as the Senator from Ohio points out.
>
> Mr. Taft. But no general information of that kind would be requested except perhaps in specific cases in which inquiry was being made relative to income-tax evasion.

Id. these remarks would seem to support the appellant's interpretation of the Treaty.

APPENDIX B

Opinion of the United States District Court of the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 18-304

UNITED STATES OF AMERICA,

Petitioner,

v.

A. L. BURBANK and BANK OF TOKYO,

Respondents.

GRIESA, J.

This is a proceeding commenced August 31, 1973 to enforce two Internal Revenue Service summonses. One summons was issued November 23, 1971 to Bank of Tokyo, Ltd., 100 Broadway, New York City. The other summons was issued December 10, 1971 to A. L. Burbank & Co., Ltd., One World Trade Center, New York City. Both summonses seek documents pertaining to tax liability of Westward Shipping, Ltd., British Columbia, Canada.

Westward has moved to intervene in order to oppose the summonses. Westward contends that the summonses are invalid because their sole purpose is to obtain inform-

ation to be turned over to the Canadian government for use in connection with tax problems of Westward in Canada.

Although at the outset of this proceeding respondents Burbank and Bank of Tokyo took no position on the validity of the summonses, they now oppose enforcement and challenge the summonses on the same ground raised by Westward.

I hold that the application of Westward to intervene must be denied. However, on the basis of the opposition asserted by Burbank and Bank of Tokyo, the petition of the United States for enforcement of the summonses is denied, and the petition is dismissed.

FACTS

As already described, both summonses state that they relate to tax liability of Westward. The summons to Bank of Tokyo contains no indication that this refers to anything other than tax liability to the United States. But the summons directed to Burbank contains the following notation:

> "For Information Required Pursuant to The Provisions of the Internal Revenue Code of 1954 and Article 19 of the Income Tax Treaty Between Canada and the United States"

In December 1971 Louis Bender, Esq., the attorney for Westward, notified Burbank and Bank of Tokyo that he considered *both* the summonses to be invalid because they sought to compel the disclosure of information to be turned over to a foreign country. Mr. Bender advised

Burbank and Bank of Tokyo that they should not comply with the summonses until Mr. Bender had submited written objections to the IRS and such objections had been ruled upon.

In a letter dated December 22, 1971 Mr. Bender made written objections to the IRS in New York City.

The IRS made no attempt to enforce the the summonses at that time. Instead, on November 14, 1972 the IRS issued a new summons to Burbank. This summons, unlike the previous one, did not refer to the tax liability of Westward, but stated that it related to the tax liability of Burbank.

On December 20, 1972 Westward obtained an order to show cause in this court on an application to quash the November 14, 1972 summons served upon Burbank. A stipulation was entered into, embodied in a court order of January 9, 1973, providing that Burbank would be stayed from complying with the November 14, 1972 summons, until such time as the government should make its own application for enforcement of said summons. In any such enforcement proceeding, Westward was to have the right to move to intervene; and apparently the government did not waive its right to object to such intervention.

The government has never applied for enforcement of the November 14, 1972 summons against Burbank. Instead, it has resurrected the original summonses served on Burbank and Bank of Tokyo in November and December 1971, and has brought the present proceeding to enforce these summonses.

The present proceeding was brought on by order to show cause, originally returnable September 11, 1973 but

adjourned to September 25, 1973. Both Burbank and Bank of Tokyo gave written representations that they would take no formal position with regard to the proceeding. It was understood that Westward would make application to intervene in the proceeding for the purpose of attacking the validity of the summonses. A stipulation to this effect was signed September 7, 1973.

A hearing was held on September 25, 1973 on the question of Westward's right to intervene and the question of the enforcability of the summonses. Decision was reserved.

On February 20, 1974 a second hearing was held. One of the main purposes of this hearing was to discuss further the purpose of the summonses. The affidavit originally filed by the government in this proceeding stated that the summonses were issued in respect to the tax liability of Westward under *both* the laws of the United States and Canada.

However, in the course of the February 20 hearing, the government attorney indicated that there might be some question as to whether there was any legitimate United States tax purpose behind the summonses. He stated:

> "Now, we will meet that question of the legitimacy of the United States inquiry. However, there is one problem in that legitimacy. The records I have indicate that the United States would never have even thought about a United States tax liability unless the Canadian authorities first requested information for Canadian purposes. In other words, it is a bootstrap situation."

Appendix B

On February 21, 1974 the government and Westward entered into a stipulation under which the government withdrew its claim to enforce the summonses by reason of any potential United States tax liability of Westward. It was stipulated that the summonses were issued solely as a result of a request to the IRS by the Canadian tax authorities.

I called a third hearing on July 9, 1974, and requested Burbank and Bank of Tokyo, as well as the government and Westward, to attend. At this hearing, I advised all parties that I had serious doubts about the ability of Westward to intervene, contrary to certain tentative indications I had given earlier. I stated that I would give Burbank and Bank of Tokyo an opportunity to decide whether, under all the circumstances now existing, they wished to oppose the summonses.

The Government strongly objected to allowing Burbank and Bank of Tokyo to depart from their written representations to the effect that they would take no position in these proceedings.

Both Burbank and Bank of Tokyo have now filed affidavits declaring their opposition to the enforcement of the summonses. Burbank asserts that it made the representation in September 1973 that it would take no position in this proceeding because of its assumption that Westward had the right to intervene and challenge the legality of the summons. Burbank further calls attention to the fact that the government originally represented that the summons was based upon both United States and Canadian tax matters relating to Westward, a position which the Government has now changed. Burbank states that it has been put on notice by Westward that

Appendix B

the summons issued against Burbank is illegal and that Burbank will be acting at its peril and be subject to liability to Westward if it complies with the summons without attempting to interpose objections.

Bank of Tokyo states that its opposition is being made because of the clear indication that the summons directed to the bank relates solely to a Canadian tax inquiry and is totally invalid. Bank of Tokyo states that there is an obligation on the part of the bank to comply only with lawful and valid process.

The government has filed an affidavit again objecting to Burbank and Bank of Tokyo being allowed to oppose the enforcement of the summonses.

Conclusions of Law

Opposition by Burbank and Bank of Tokyo

I hold that Burbank and Bank of Tokyo should be permitted to oppose the summonses despite the representations or commitments they made when this proceeding was commenced. At that time the government had announced that the summonses were based on *both* United States and Canadian tax liabilities of Westward, thus presenting a much stronger basis for the legality of the summonses than if the summonses had reference only to Westward's Canadian tax problems.

The goverment has now changed its position on this crucial point. In my view, Burbank and Bank of Tokyo are entitled to reconsider their position on the question of whether they will or will not oppose the summonses.

The goverment contends that it entered into the stipulation of February 21, 1974 with Westward in part on the basis of the September 1973 representations made by Burbank and Bank of Tokyo. But the government is not requesting to be relieved of its February 21, 1974 stipulation. Indeed, it is quite plain that the reason the government withdrew its claim about any United States tax liability of Westward is that no such liability is in fact under consideration. See Minutes of July 9, 1974, p. 41.

In any event, the fact is that the government has substantially changed its position as to the alleged legal basis for the summonses. Burbank and Bank of Tokyo should be permitted to change their positions and to challenge the enforceability of the summonses.

Illegality of the Summonses

The statutory provision on which this matter depends is 26 U.S.C. § 7602, which states in pertinent part:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> . . .
>
> "(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing

> entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; . . ."

The government relied on the following articles of the Tax Treaty of 1942 between the United States and Canada:

> "ARTICLE XIX. With a view of the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws insofar as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.
>
> "The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.
>
> "ARTICLE XXI. 1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon

the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

"2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada."

The effect of the treaty provisions, in the case of a request by Canada to the United States for tax information, is that Canada may obtain from the United States information which the United States taxing authorities have at their disposal, or are in a position to obtain, under United States revenue laws. Thus, there is no independent authority under the Tax Treaty for the issuance of summonses by the IRS over and above what is authorized under the applicable United States statute. As far as the present case is concerned, the relevant United States statute is 26 U.S.C. § 7602.

Although § 7602 is broad in many respects, it does have a limitation which is crucial to the present case. A summons issued under this section must be for a purpose relating to the determination of liability for an "internal revenue tax". No party to the present proceeding contends that the phrase "internal revenue tax" means other than a United States tax. Consequently § 7602 authorizes a summons relating only to a United States tax matter.

The Tax Treaty, taken in conjunction with § 7602, would appear to be applied in the following manner. If the IRS

has, or may obtain, information pursuant to a legitimate investigation of a party's United States tax liability, it may turn over such information to the Canadian government. But there is no authority either in the treaty or the statute for issuance of an IRS summons *solely* for the purpose of aiding Canadian tax authorities in a Canadian tax investigation.

The government argues that, to the extent that the § 7602 limitation regarding "internal revenue tax" is in conflict with the tax treaty, the section should be read as excluding such language. The government relies on 26 U.S.C. § 7852(d), which provides:

> "No provision of this title [the Internal Revenue Code of 1954] shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title."

However, in my view, the language of the statute is not in any way contrary to the provisions of the treaty, but the two are perfectly consistent. The treaty provides that the United States government will furnish to the Canadian government whatever information the United States government can obtain under its laws. 26 U.S.C. § 7602 specifies what the United States government can obtain under United States law.

Westward's Intervention

The question of Westward's right to intervene is somewhat academic in view of the fact that the respondents—Burbank and Bank of Tokyo—have now asserted their opposition to the summonses.

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Nevertheless, there is an application by Westward to intervene which must be ruled on, and I am constrained to deny that application.

Apparently the latest Supreme Court pronouncement on the problem is the decision in *Donaldson* v. *United States,* 400 U.S. 517 (1971). It seems to me that the *Donaldson* case is somewhat ambiguous. The majority opinion at first states the view that taxpayer intervention is permissive, although not mandatory, and that a district court "upon the customary showing, may allow the taxpayer to intervene" (400 U.S. at 529-30). The opinion mentions two instances where intervention is appropriate—where the material is sought improperly for use in a criminal prosecution, and where the material is protected by the attorney-client privilege. The *Donaldson* opinion goes on to state that intervention by a taxpayer in a summons enforcement proceeding "might well be allowed when the circumstances are proper", and that there should be the "usual process of balancing opposing equities" (400 U.S. at 530).

If the *Donaldson* discussion had ended at that point, the decision would probably mean that a district court has rather broad discretion to permit taxpayer intervention. But the *Donaldson* opinion went on to announce its express approval and disapproval of certain court of appeals decisions in various circuits. One of the decisions cited with approval was the Second Circuit case of *In re Cole,* 342 F.2d 5 (2d Cir.), *cert. denied,* 381 U.S. 950 (1965). The *Cole* case states:

> "The taxpayer, under circumstances where only books, records and other papers belonging to the third party are the subject of the summons, has no standing to object to the summons." 342 F.2d at 8.

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It would appear that the rule of the *Cole* case, expressly approved by the Supreme Court in *Donaldson,* leaves no room for Westward to intervene in the present case.

CONCLUSION

The motion of Westward Shipping, Ltd. to intervene is denied.

The petition of the United States to enforce the summonses in question is denied, and the petition is dismissed.

So ordered.

Dated: New York, New York
July 31, 1974

THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 74-2342

UNITED STATES OF AMERICA,

Petitioner-Appellant,

v.

A. L. BURBANK & CO. LTD.,

Respondent-Appellee.

UNITED STATE OF AMERICA,

Petitioner-Appellant,

v.

BANK OF TOKYO, LTD.,

Respondent-Appellee,

WESTWARD SHIPPING LTD.,

Intervenors-Cross-Appellant.

Appendix C

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of December, one thousand nine hundred and seventy-five.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the intervenor cross appellant and respondent appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of October, one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE
HON. WILLIAM H. MULLIGAN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

UNITED STATES OF AMERICA,

Petitioner-Appellant,

v.

A. L. BURBANK & CO., LTD.,

Respondent-Appellee.

Appendix D

UNITED STATES OF AMERICA,

Petitioner-Appellant,

v.

BANK OF TOKYO, LTD.,

Respondent-Appellee.

WESTWARD SHIPPING LTD.,

Appellant.

74-2342, 74-2359
75-7186, 74-2470

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it is affirmed in part and reversed in part in accordance with the opinion of this court with costs to be taxed against the respondents-appellees and intervenor cross-appellant.

A. DANIEL FUSARO
Clerk
By VINCENT A. CARLIN
Chief Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1277

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., and WESTWARD SHIPPING, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1277

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., and WESTWARD SHIPPING, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners A. L. Burbank & Co., Ltd., Bank of Tokyo, Ltd., and Westward Shipping, Ltd., having timely filed a petition in this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit on March 8, 1976, respectfully submit this supplemental petition*

* Rule 24.5 of this Court indicates that for reasons such as hereinafter set forth a supplemental brief may be filed by any party while the petition for a writ of certiorari is pending. This would presuppose the prior filing of an original brief, which Rule 23.3 says is prohibited when a petition for a writ of certiorari is filed. The Clerk's Office of this Court has advised petitioners that for present purposes this supplement may be designated as a "supplemental petition" rather than a "supplemental brief".

for a writ of certiorari, in order to call this Court's attention to a new case not available at the time of petitioners' filing of their original petition for a writ of certiorari. Petitioners respectfully submit that the new case provides an additional reason for this Court to grant a writ of certiorari; alternatively, petitioners respectfully submit that the new case warrants this Court in remanding this case to the Court of Appeals for reconsideration or clarification of that Court's opinion.

The applicable facts and decisions below are discussed in the original petition for a writ of certiorari (at pp. 7-16 thereof), and the contents thereof are respectfully incorporated herein by reference.

The New Case

In its appellate brief in the Court of Appeals, the Government argued that:

> "The very issue [present in this case] of whether the broad exchange of information language of a tax treaty will be limited by local law appearing to require dual tax investigations was faced in *X* v. *Eidgenossische Steuerverwaltung* (*The Federal Tax Administration*), 96(i) B.G.E. 737 (Official text), [1971] J.Trib. I, 571 (French translation), 71-1 USTC ¶9435 (unofficial English translation) (Dec. 23, 1970) [hereinafter X v. FTA]."*

The Government argued that in *X* v. *FTA*,

> "The Swiss Supreme Court interpreted the analogous Swiss-United States Tax Treaty in a manner

* Brief for the United States, p. 15.

> consistent with our view of the United States-Canadian Tax Treaty."*

The Government described the Swiss Supreme Court's decision in *X* v. *FTA* as involving the interpretation of "a virtually identical provision" as the exchange-of-information provision involved in the instant case.** The Government's reliance in the Court of Appeals on *X* v. *FTA* is clearly evidenced by its emphasis in its appellate brief (at pp. 15-17 thereof), in its reply brief in the Court of Appeals (at pp. 9-10 thereof), and in its oral argument in the Court of Appeals. Indeed, the Swiss Supreme Court's decision in *X* v. *FTA* was the only judicial decision cited by and relied upon by the Government as having been rendered by any court in any country in the world in support of the Government's argument that "other tax treaties similar to the United States-Canadian Tax Treaty . . . have been interpreted to authorize the exchange of information when only one state has a tax investigation."***

The decision of the Court of Appeals, while not expressly citing *X* v. *FTA*, relied upon and followed that decision's reasoning. The Swiss Supreme Court in *X* v. *FTA* held, in an excerpt quoted by the Government in its brief in the Court of Appeals (at p. 17 thereof), that under its interpretation of the exchange-of-information provision, "each contracting State agrees to furnish the contracting partner with information that it could obtain

* Brief for the United States, p. 17.

** Brief for the United States as Cross-Appellee and Reply Brief for the United States as Appellant, p. 10.

*** Brief for the United States, p. 15.

under the national law in force if the situation were reversed", a holding emphasized at great length by the Government in its briefs before the Court of Appeals and during oral argument. The Court of Appeals resultantly held:

> "We think the fair reading of the Treaty is that if Canada is investigating the tax liability of one who is potentially delinquent to it, then the United States may utilize the same investigative techniques that it would employ if that person were under investigation here for a domestic tax liability. To do otherwise would negate the very purpose of the Treaty." *United States* v. *A. L. Burbank & Co., Ltd., et al.*, 525 F.2d 9, 13 (2d Cir. 1975).

This reasoning by the Circuit Court, which followed the reasoning of the Swiss Supreme Court in *X* v. *FTA,* reflects the Circuit Court's adoption of the Government's argument that the Swiss Supreme Court's decision in *X* v. *FTA,* as the sole relevant judicial decision in the world on the issue then before the Circuit Court, should be followed by the Circuit Court—and it was so followed.

Petitioners have just learned, however, that the Swiss Supreme Court has substantially modified its decision in *X* v. *FTA.* Moreover, the Internal Revenue Service was a party to the proceedings in which the Swiss Supreme Court modified its decision, and, notwithstanding the fact that said modification preceded the Government's filing of its reply brief in the Court of Appeals and also preceded oral argument of this case in the Court of Appeals, the Government continued to urge the Circuit Court to follow the Swiss Supreme Court's decision in *X* v. *FTA* without informing the Circuit Court or petitioners of the later decision.

On May 16, 1975, the Swiss Supreme Court rendered a further decision in the same case officially reported at 101-(I) B.G.E. 160.

This opinion was first published in this country, in an unofficial translation, at 37 AFTR2d 76-1282, 1976 P-H Fed. ¶76-591 (published April 29, 1976). Although this decision was not available to petitioners, it was available to the Government, as a party to the decision, as of May 16, 1975, the date of the decision. The Government's reply brief in the Court of Appeals was filed on June 25, 1975, and oral argument was held on September 25, 1975; yet at no time did the Government advise the Court of Appeals or petitioners of the new decision, urging instead the Court to follow the original decision in *X* v. *FTA* rendered in 1970, without the slightest mention or hint of the later decision and its substantial modification of the first decision.

The Swiss Supreme Court, in its second opinion in *X* v. *FTA* (hereinafter referred to as "X. v. FTA(II)"), held that although (under its original *X* v. *FTA* decision) a contracting state to whom a request for assistance is made pursuant to an exchange-of-information provision in a tax treaty may transmit "information" to the requesting state, nevertheless (1) the tax treaty does not authorize use of compulsory process by the requested state for the purpose of obtaining documentary evidence and interrogating witnesses; (2) the tax treaty authorizes merely the transmittal of information, not the obtaining or transmittal of documentary evidence or transcribed testimony; and (3) the tax treaty was not intended as a vehicle for the contracting countries to provide a broad range of legal assistance by each country to the other. The Swiss Supreme Court expressly held:

> "It is essential, however, that the Federal Supreme Court [in the original *X* v. *FTA* decision] at that

time didn't want to, and didn't have to, take a position on legal assistance rendered that was more than the transmission of information. . . . The official legal assistance stipulated within [the Treaty] should not however, through interpretation, be expanded into a comprehensive obligation of legal assistance. . . . Even though the Federal Supreme Court defined the scope of information obtainable and transmittable to the IRS somewhat differently than had been customary in prior administrative practice, nevertheless the contractually determined form of the granting of official assistance—namely the transmission of information—was not in question, but rather the only concern was the determination of the permissible content of such information. It doesn't follow from isolated phases in the [original *X* v. *FTA* decision] that the Court interprets [the exchange-of-information provision] as an obligation to give comprehensive legal assistance. . . . [T]he obligation to give official assistance under the text and purport of [the Treaty] is limited to the transmission of information and does not encompass specific steps of actual legal assistance. . . . Since the obligation to give official assistance under the text and purport of [the Treaty] is limited to the transmission of information and does not encompass specific steps of actual legal assistance, the additional investigatory actions [*i.e.*, the compelled production of documentary evidence and the questioning of witnesses] directed under the order of August 31, 1973 [of the Confederation Tax Administration] aren't covered by the contractual obligations. Therefore the challenged decision contravenes the Federal law and the Administrative Court appeals should be upheld."

The summonses in the instant case demand precisely what the Swiss Supreme Court in *X* v. *FTA(II)* held to be not authorized by the Treaty: the compulsory giving of testimony and production of documentary evidence. The Government, in urging the Court of Appeals to uphold the summonses based upon the authority of *X* v. *FTA*, simply concealed from the Court of Appeals that the Swiss Supreme Court, in its decision in *X* v. *FTA(II)*, expressly rejected the proposition urged by the Government that the Tax Treaty authorizes the use of compulsory process to obtain such testimony and compelled production of documents as is sought by the instant summonses. Thus, the Government in the Court of Appeals in this action urged that Court to follow a decision which it knew had been significantly modified, and which the Government further knew had been subsequently characterized by the very Swiss court in question as being a treaty interpretation that was "somewhat different than . . . customary". In short, the Government presented the Court of Appeals with a proposition of international law as set forth by the Swiss Supreme Court which the Government knew the Swiss Supreme Court had substantially retreated from and qualified in *X* v. *FTA(II)* without in any manner advising the Circuit Court of the decision in *X* v. *FTA(II)*, even though *X* v. *FTA(II)*, if followed by the Court of Appeals (as *X* v. *FTA* was), would invalidate the summonses at issue.

The Appropriate Relief

The Court of Appeals' mandate is ambiguous at this juncture. Although the Court of Appeals "reversed" the District Court's Order denying enforcement of the summonses, the Circuit Court's mandate does not state whether

the United States may transmit only "information" to Canada, or whether the United States may also transmit actual documentary or other evidence to Canada. Insofar as the Circuit Court's decision may be construed by the Government as authorizing the transmittal to Canada of more than "information", then the Circuit Court's decision would be in direct conflict with the decision of the Swiss Supreme Court in *X* v. *FTA(II)*. Thus, the Circuit Court's decision stands in direct conflict not only with Canada's own interpretation of the United States-Canada Tax Treaty (see Point I of petitioners' original Petition for a writ of certiorari), but would also conflict with Switzerland's interpretation of the exchange of information provision in the United States-Switzerland Treaty which the Government itself has recognized as being "virtually identical" to the United States-Canada Treaty.* The Circuit Court's opinion would therefore be in direct conflict with the interpretation of the exchange-of-information provision of the United States' tax treaties espoused by both of the United States' treaty partners which have ruled on the issue. It is respectfully submitted that this conflict between the United States' interpretation of the exchange-of-information provision and the interpretation placed upon the provision by Canada and by Switzerland warrants review and resolution by this Court.

Petitioners respectfully submit, as an alternative, that this case should be remanded to the Circuit Court, for two reasons. First, as noted above, the Circuit Court's mandate is ambiguous as to whether the United States may transmit to Canada not only "information" but also

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* See brief for the United States as Cross-Appellee and Reply Brief for the United States as Appellant, p. 10.

documentary and other evidence, or whether the United States may transmit to Canada only "information" (which was the limitation imposed by the Swiss Supreme Court in *X* v. *FTA(II)*). This issue was not presented to nor considered by the Circuit Court, and was therefore not ruled upon, because of the Government's failure to disclose to the Circuit Court the decision in *X* v. *FTA(II)*. Furthermore, remand to the Circuit Court is appropriate in order to permit that Court to reconsider its decision in view of the decision in *X* v. *FTA(II)*. It is respectfully submitted that where, as here, the Government has urged the Circuit Court to adopt—and the Circuit Court in fact adopted—the reasoning of the only foreign country that has judicially considered the issue; where that foreign country's highest court has substantially modified its decision; and where information concerning that modification has been withheld from the Circuit Court by the Government, then the Circuit Court should be given the opportunity to reconsider its decision.

A further reason warrants this Court in remanding this case. Additional recent events, which occurred subsequent to the decision below and which received worldwide publicity, justify petitioners' request in the alternative that this Court remand this case in order to permit additional factual information to be obtained concerning the initial refusal of the United States to honor the request of the Japanese and Italian Governments for information and evidence of alleged Lockheed Aircraft payments to Japanese and Italian officials. Japan and Italy are two of the eighteen other countries urged by the United States and noted by the Court of Appeals below as having exchange-of-information provisions identical to those in the United States-Canada Tax Treaty at issue (525 F.2d at 12, n. 2). To the extent the United States

disclaimed any such obligation—as it was publicly reported to have done—then that position would have been in direct conflict with the position of the Government urged and adopted by the Court of Appeals in this case.

CONCLUSION

For the above reasons, and for the reasons set forth in petitioners' original petition for a writ of certiorari, it is respectfully submitted that the original petition and this supplemental petition for a writ of certiorari should be granted. Alternatively, it is respectfully submitted that this supplemental petition for a writ of certiorari should be granted and the case should be remanded to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 75-1277

In the Supreme Court of the United States

OCTOBER TERM, 1975

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., AND WESTWARD SHIPPING, LTD., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B 18a–29a) is not reported. The opinion of the court of appeals (Pet. App. A 1a–17a) is reported at 525 F. 2d 9.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1975 (Pet. App. D 32a–33a). A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on December 23, 1975 (Pet. App. C 30a–31a). The petition for a writ of certiorari was

filed on March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether upon request of the Canadian tax authorities in accordance with Articles XIX and XXI of the Income Tax Convention between the United States and Canada, the Internal Revenue Service can summon information from United States-based corporations, pursuant to its authority under 26 U.S.C. 7602, for the sole purpose of aiding a Canadian tax investigation.

2. Whether a Canadian corporation has a right to intervene in an Internal Revenue summons enforcement proceeding to compel the production of third-party bank and brokerage records located in the United States.

TREATIES, STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Section 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.), of Articles XIX and XXI of the Income Tax Convention with Canada of March 4, 1942, 56 Stat. 1405 and 1406, and of Section 519.120 of the Treasury Regulations pertaining to the Income Tax Convention with Canada (26 C.F.R.) are set forth at pp. 3–7 of the petition.

The other pertinent statute, Section 7852(d) of the Internal Revenue Code (26 U.S.C.), states as follows:

SEC. 7852. Other applicable rules.

* * * * *

(d) Treaty obligations.

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.

STATEMENT

Pursuant to a request from the Canadian tax authorities under Articles XIX and XXI of the Income Tax Convention between the United States and Canada, the Internal Revenue Services issued summonses to petitioners Bank of Tokyo, Ltd., and A. L. Burbank & Co., Ltd., to produce books and records in their possession which were relevant to the potential tax liability of Westward Shipping, Ltd., a Canadian corporation which has no presence in the United States. In this summons enforcement proceeding brought by the government in the United States District Court for the Southern District of New York, both Burbank and the Bank of Tokyo agreed to take no position in the proceedings. Petitioner Westward, the taxpayer under investigation by the Canadian tax authorities, sought to intervene to prevent the enforcement of the summenses. Pursuant to a stipulation of the parties to the proceedings, the government agreed that the summonses were issued solely as a result of a request by the Canadian tax authorities under the Income Tax Convention between the United States and Canada in connection with a Canadian tax investigation of Westward. Westward in turn agreed that the materials sought were relevant to the Canadian tax

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investigation. After the district court ruled that Westward had no standing to intervene, Burbank and the Bank of Tokyo agreed to oppose the enforcement of the summonses (Pet. App. A 3a–5a; Pet. App. B 19a–23a).

The district court denied enforcement of the summonses. It held that the United States-Canada Tax Convention provided no independent compulsory process apart from the Internal Revenue Code and that Section 7602 of the Code authorized the issuance of a summons to produce books and records only in connection with the determination of a United States tax liability (Pet. App. B 23a–27a). The district court also held that under this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, Westward had no right to intervene where, as here, only books and records of a third party were the subjects of the summonses (Pet. App. B 28a–29a).

The court of appeals reversed the district court's order with respect to enforcement of the summonses (Pet. App. A 1a–16a). It held that Articles XIX and XXI of the Tax Convention authorized the United States to exercise the same investigative summons power that could be employed in an investigation of a United States tax liability in connection with a request for information by the Canadian tax authorities (Pet. App. A 5a–10a). The court of appeals also affirmed the district court's holding that Westward had no right to intervene in the summons enforcement proceeding (Pet. App. A 17a).

ARGUMENT

1. The court of appeals correctly held, in what it characterized as (and petitioners concede to be) a case "of first impression in this country" (Pet. App. A 3a; Pet. 19),[1] that Articles XIX and XXI of the Income Tax Convention of March 4, 1942, between the United States and Canada authorized the Internal Revenue Service to issue summonses under 26 U.S.C. 7602 to examine books and records of third parties solely in aid of a Canadian tax investigation. The language and policy objectives of the Tax Convention with Canada, the understanding of the United States Senate in ratifying the Convention, and the Senate's understanding of similar provisions in other income tax treaties, all support the enforcement of the summonses ordered by the court of appeals.

Article XIX of the United States–Canada Tax Convention provides in pertinent part (56 Stat. 1405):

> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the

[1] Although petitioners assert (Pet. 23–24) that numerous cases are in conflict with the decision below, those cases all involve summonses for the determination of United States tax liabilities and do not concern the provisions of any tax treaty.

assessment of the taxes to which this Convention relates.

Article XXI, Section 1, states (56 Stat. 1406):

> If the [Canadian] Minister [of National Revenue] in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the [United States] Commissioner [of Internal Revenue], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

Thus, under the plain terms of the Convention, where the Canadian Minister of National Revenue seeks information from the Commissioner of Internal Revenue for a Canadian tax investigation, the United States undertakes to furnish, and the Commissioner may obtain under the revenue laws of the United States (which include the summons power of 26 U.S.C. 7602), information that is relevant in the determination of the income tax liability of any person under the Canadian tax laws. Indeed, since Article XXI specifically refers to information concerning "the income tax liability of any person under any of the revenue laws of Canada," there is no basis for limiting the exchange of information provisions to information that might bear only upon a United States tax liability. Accord: Section 519.120, Treasury Regulations on the Income Tax Convention with Canada (26 C.F.R.).[2]

[2] The Treasury Regulations on the Income Tax Convention with Canada were reviewed and agreed upon at joint meetings by both

As the decisions of this Court have well established (see, *e.g.*, *United States* v. *Bisceglia*, 420 U.S. 141, and cases cited therein), one investigatory procedure available to the Commissioner to obtain information is the summons power conferred by Section 7602 of the Code. Such summonses may be issued to examine books, papers, records, or other data, or to command the presence of any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax "[f]or the purpose of ascertaining the correctness of any return * * * [or] determining the liability of any person for an internal revenue tax * * *." As the court of appeals observed (Pet. App. A 10a), Section 7852(d) of the Code, which forbids the application of any provision of the Code contrary to any treaty obligation of the United States, refutes the contention of petitioners Burbank and the Bank of Tokyo (Pet. 20–24) that the Section 7602 summons power requires the existence of a United States tax investigation or liability. Since the Tax Convention with Canada requires the United States to use its procedural powers to obtain information for the determination of the income tax liability of any per-

countries. Statement of Eldon P. King, Special Deputy Commissioner, Bureau of Internal Revenue, Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 24 (1947) (1 Leg. Hist. of United States Tax Convs. 945, 962 (1962)).

son under any revenue laws of Canada, the Convention thus clearly authorizes the use of the summons power.

That the United States was obligated to employ every procedure available under the Internal Revenue Code, including the summons power, to obtain information relevant to an investigation with respect to a Canadian tax liability, without reference to any tax liability to the United States, is evident from the scheme and policy of the Convention. The dual purposes of the Convention, as recited in its preamble and set forth in its substantive provisions, were to avoid double taxation and to prevent fiscal evasion. To accomplish the former purpose, the Convention contains a number of provisions under which income of individuals or corporations resident or based in one country, derived from activity or sources in the other, which would otherwise be subject to taxation by both countries, is to be taxed only by the country of residence or base, *i.e.*, by the "permanent establishment." [3] To avoid abuse of these and similar provisions and to prevent evasion of the income tax law of the taxing State, each State agreed under Articles XIX and XXI to furnish the other with information relevant to the requesting State's tax investigation that the requested State could obtain under the mechanisms of its domestic law.

If petitioners were correct that the United States could not use the summons authority of the Internal

[3] In other instances, such as where a taxpayer has permanent establishments in both countries, income, for purposes of taxation, is allocated to one or the other country.

Revenue Service to fulfill its treaty obligation where only a Canadian tax investigation is at stake, the result would be that neither State could obtain a large amount of relevant information. For example, in the case of a Canadian resident earning income from an activity or source within the United States, Canada could not obtain the information from American sources because its process does not reach within the United States. Likewise, the United States, under petitioners' construction of the Convention, could not obtain the information at the request of Canadian authorities because, by virtue of the treaty provisions against double taxation, there would be no United States tax interest involved. That result would not only facilitate abuse of the provisions against double taxation, it would, as the court of appeals observed (Pet. App. A 8a), "negate the very purpose of the Treaty." [4]

2. The decision below is in accord with the legislative history of the Tax Convention with Canada. At

[4] In generally discussing the exchange of information provisions in the United States tax treaties, including the tax treaty with Canada, Mr. King, Special Deputy Commissioner, Bureau of Internal Revenue, stated (Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 21 (1947) 1 Leg. Hist. of United States Tax Convs. 945, 959, (1962)): "The theory back of all our conventions to date in that regard has been that if countries meet to eliminate or substantially eliminate double taxation, and make every possible effort they can in that direction, that regime should be accompanied by provisions for effective administrative cooperation. Otherwise it is quite easy in this field to produce a situation where, in the process of eliminating double taxation, we end up with no taxation at all."

the time of its ratification of the Convention, the Senate understood that the contracting States were to use their procedural powers to obtain information solely for the determination of a tax liability of the requesting State. This is made clear by the following remarks of Senators Taft and George during the debate on the Treaty (88 Cong. Rec. 4714 (1942)), upon which the court of appeals relied (Pet. App. A 16a–17a, n. 7):

> Mr. TAFT. * * * In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the convention would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.
>
> Mr. GEORGE. It does provide for exchange of information, as the Senator from Ohio points out.
>
> Mr. TAFT. But no general information of that kind would be requested except perhaps in specific cases in which inquiry was being made relative to income-tax evasion.

To the same effect is a letter from the Acting Secretary of State which accompanied the Treaty when it was presented to Congress for ratification. S. Exec. B, 77th Cong., 2d Sess. 1, 2, 4–5 (1942) (1 Leg. Hist. of United States Tax Convs. 445, 448–449 (1962)); Pet. App. A 16a, n. 7.

Moreover, virtually all of the other tax treaties in effect between the United States and foreign countries contain exchange of information provisions similar to the Canadian treaty.[5]

[5] In addition to the income tax treaties with Canada, Switzerland and Luxembourg, similar exchange of information provisions are included in the following treaties: Income Tax Convention with Australia, May 14, 1953, 4 U.S. Treaties (Part 2) 2274, 2285, Art. XVIII; Estate Tax Convention with Australia, May 14, 1953, 5 U.S. Treaties (Part 1) 92, 99, Art. VI; Income Tax Convention with Austria, October 25, 1956, 8 U.S. Treaties (Part 2) 1699, 1708–1709, Art. XVI; Income Tax Convention with Belgium, July 9, 1970, 23 U.S. Treaties (Part 3) 2687, 2710, Art. 26; Estate Tax Convention with Canada, February 17, 1961, 13 U.S. Treaties (Part 1) 382, 387–388, Arts. VII, VIII, IX; Income Tax Convention with Denmark, May 6, 1948, 62 Stat. 1730, 1736, Art. XVII; Income and Property Tax Convention with Finland, March 6, 1970, 22 U.S. Treaties (Part 1) 40, 74–75, Art. 29; Estate Tax Convention with Finland, March 13, 1952, 3 U.S. Treaties (Part 3) 4464, 4469–4470, Art VII; Income and Property Tax Convention with France, July 28, 1967, 19 U.S. Treaties (Part 4) 5280, 5313–5314, Art. 26; Income Tax Convention with the Federal Republic of Germany, July 22, 1954, 5 U.S. Treaties (Part 3) 2768, 2800–2802, Art. XVI(1), (3), as amended by the Protocol to the Income Tax Convention with the Federal Republic of Germany, September 17, 1965, 16 U.S. Treaties (Part 2) 1875, 1888, Art. 14; Income Tax Convention with Greece, February 20, 1950, 5 U.S. Treaties (Part 1) 47, 75, 77, 79, Arts. XVIII, XX; Estate Tax Convention with Greece, February 20, 1950, 5 U.S. Treaties (Part 1) 12, 27, 29, 31, Arts. VIII, X; Income and Capital Tax Convention with Iceland, May 7, 1975, Art. 29 (1 C.C.H. Tax Treaties, par. 3732); Income Tax Convention with Ireland, September 13, 1949, 2 U.S. Treaties (Part 2) 2303, 2316, Art. XX; Estate Tax Convention with Ireland, September 13, 1949, 2 U.S. Treaties (Part 2) 2294, 2300, Art. VII; Income Tax Convention with Italy, March 30, 1955, 7 U.S. Treaties (Part 3) 2999, 3013–3014, Art. XVII; Estate Tax Convention with Italy, March 30, 1955, 7 U.S. Treaties (Part 3) 2977, 2983–2984, Art. VI; Income Tax Conven-

Thus, for example, Article XVIII of the Income Tax Treaty with Luxembourg of December 18, 1962, 15 U.S. Treaties (Part 2) 2355, 2367, provides that "[t]he competent authorities of the Contracting

tion with Japan, March 18, 1971, 23 U.S. Treaties (Part 1) 967, 1006–1007, Art. 26; Estate Tax Convention with Japan, April 16, 1954, 6 U.S. Treaties (Part 1) 113, 123, Art. VI; Income Tax Convention with the Netherlands, April 29, 1948, 62 Stat. 1757, 1766, Art. XXI; Income Tax Convention with New Zealand, March 16, 1948, 2 U.S. Treaties (Part 2) 2378, 2387–2388, Art. XVI; Income and Property Tax Convention with Norway, December 3, 1971, 23 U.S. Treaties (Part 3) 2832, 2857–2858, Art. 28; Estate Tax Convention with Norway, June 13, 1949, 2 U.S. Treaties (Part 2) 2353, 2357–2358, Arts. VII, VIII; Income Tax Convention with Pakistan, July 1, 1957, 10 U.S. Treaties (Part 1) 984, 993, Art. XVI; Income Tax Convention with Sweden, March 23, 1939, 54 Stat. 1759, 1768–1772, Arts. XV, XVI, XVIII, XIX; Income Tax Convention with Trinidad and Tobago, January 9, 1970, 22 U.S. Treaties (Part 1) 164, 185, Art. 24; Income Tax Convention with the Union of South Africa, December 13, 1946, 3 U.S. Treaties (Part 3) 3821, 3829–3830, Arts. XIV, XVI, XVII; Estate Tax Convention with the Union of South Africa, April 10, 1947, 3 U.S. Treaties (Part 3) 3792, 3799, Art. VII; Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland, April 16, 1945, 60 Stat. 1377, 1386, Art. XX; Estate Tax Convention with the United Kingdom of Great Britain and Northern Ireland, April 16, 1945, 60 Stat. 1391, 1394–1395, Art. VII.

In addition to the treaties now in force, a similar exchange of information provision is contained in the recently signed Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland of December 31, 1975, Art. 26 (2 C.C.H. Tax Treaties, par. 8103); Income Tax Convention with the Polish People's Republic of October 8, 1974, Art. 23 (2 C.C.H. Tax Treaties, par. 7026); Income Tax Convention with Romania of December 4, 1973, Art (2 C.C.H. Tax Treaties, par. 7278); and the Income Tax Convention with the United Arab Republic of October 28, 1975, Art. 28 (2 C.C.H. Tax Treaties, par. 8033).

States shall exchange such information, being information available under the respective taxation laws of the Contracting States, as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention." The Senate Report accompanying this treaty (S. Exec. Rep. No. 10, 88th Cong., 2d Sess. 38 (1964)) stated that "The information to be exchanged [under Article XVIII] is that which would be available under the taxation laws of the country to which the request for information is directed if the tax of the requesting country were its own tax." The equating of the foreign tax to the United States tax removes any impediment to the use of an administrative summons simply because there is no concurrent United States tax liability involved.[6] Such similar treaty pro-

[6] See also the legislative history of Article XX of the Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland of April 16, 1945, 60 Stat. 1377, 1386, and of Articles 8 through 11 of the Income and Estate Tax Convention with France of October 18, 1946, 64 Stat. B3, B15–B20, where the Canadian exchange of information provisions were mentioned. S. Exec. Rep. No. 4, 79th Cong., 2d Sess. 21 (1946) (2 Leg. Hist. of United States Tax Convs. 2721, 2741 (1962)); Hearing on Conventions with Great Britain and Northern Ireland Respecting Income and Estate Taxes before a Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 1st Sess. 56–57 (1945) (2 Leg. Hist. of United States Tax Convs. 2583, 2622–2623 (1962)); Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 21–23, 26, 79 (1947) (1 Leg. Hist. of United States Tax Convs. 945, 959–961, 964, 1017 (1962)).

The portion of the legislative history upon which petitioners rely (Pet. 25–26) is irrelevant. First, the statement they cite deals

visions, as this Court has held, are highly relevant in construing the Treaty at issue. See, *e.g., Kolovrat* v. *Oregon,* 366 U.S. 187, 193, 196; *Charlton* v. *Kelly,* 229 U.S. 447, 467, 473.[7]

with collection of taxes for a foreign State (a provision found in certain of the United States tax treaties, but not included in the Canadian treaty) and not with the exchange of information with a foreign State. Second, the statement does not purport to list all the Code provisions with respect to the collection of taxes.

With respect to the legislative history of the recent Iceland, Polish, and Romanian Tax Conventions, see S. Exec. Rep. No. 94–15, 94th Cong., 1st Sess. 5, 7 (1975), and the technical explanations, which are unofficially published at 1 C.C.H. Tax Treaties, par. 3739 and 2 C.C.H. Tax Treaties, pars. 7032 and 7285.

[7] Although the question in this case is "one of first impression in this country" (Pet. App. A 3a), the Federal Tribunal of Switzerland (the highest court in Switzerland) faced the same issue in the context of a similar exchange of information provision (Article XVI) in the Swiss-American Tax Convention of May 24, 1951, 2 U.S. Treaties (Part 2) 1753, 1760–1761. In *X* v. *Eidgenössische Steuerverwaltung* (*The Federal Tax Administration*), 96 (I) B.G.E. 737, 746–747 (official text), [1971] J. Trib. 1, 571, 580 (French translation), 71–1 U.S.T.C., par. 9435, p. 86,571 (unofficial English translation), the Swiss court held that the Swiss Federal Tax Administration could use domestic investigatory procedures to obtain information relevant to a United States tax investigation even though there was no concurrent Swiss tax investigation. Contrary to petitioners' assertion (Supp. Pet. 3), there is no reason to believe that the court of appeals, which did not cite the Swiss authority in its opinion, would have reached a different result if it had been aware of the subsequent high court Swiss decision in *X. and Y-Bank* v. *Eidgenössische Steuerverwaltung*, 101 (I) B.G.E. 160, 163–165 (official text), 37 A.F.T.R. 2d 76–1282 (unofficial English translation). There, the court held that the exchange of information provision of the Swiss-American Tax Convention of May 24, 1951, did not authorize the Swiss Federal Tax Administration to transmit records authenticated for use

Contrary to petitioners' contention (Pet. 17–20), the fact that the Canadian Government may have at one time taken a position different from that of the United States[8] with respect to the circumstances under which it would furnish information to the United States tax authorities does not cast doubt upon the correctness of the decision below. As the court of appeals observed (Pet. App. A 11a), it is not clear that the Canadian Government has ever

in an American court. However, the question of authentication of documents for use in a judicial proceeding is not involved here. Thus, petitioners' accusation (Supp. Pet. 5–9) that the government withheld its knowledge of the second Swiss decision from the court of appeals is likewise irrelevant. In fact, we first learned of the second *X* case after the filing of the petition.

[8] The part of the Internal Revenue Service Manual cited by petitioners (Pet. 17) was added to the Manual by T.M. 9200–5 on May 24, 1962, and was addressed to agents as to what requests should contain when information was to be sought from Canada under the exchange of information provisions. We are advised by the Internal Revenue Service that this provision in the Manual resulted from conversations between officials of the Internal Revenue Service and of the Canadian Ministry of Revenue between 1960 and 1962 and reflected the Internal Revenue Service's understanding, though not approval, of the Canadian position at that time. The fact that the provisions cited by petitioners do not apply to other treaties, which have the same exchange of information provisions, indicates that the cited position reflects only a Canadian position, and not a United States position. See Section 9265.3, Internal Revenue Service Manual of 1962 and Section 9265.3 of the Internal Revenue Service Manual of 1974.

At all events, the Manual is not authoritative as to either the position of the United States or Canada. See *Biddle* v. *Commissioner*, 302 U.S. 573, 582; *Dixon* v. *United States*, 381 U.S. 68, 73; *Rosenberg* v. *Commissioner*, 450 F. 2d 529 (C.A. 10).

officially differed with the United States concerning the interpretation of the Convention. At all events, this Court has held in *Charlton* v. *Kelly*, 229 U.S. 447, 473, *Factor* v. *Laubenheimer*, 290 U.S. 276, and *Whitney* v. *Robertson*, 124 U.S. 190, 194–195, that it is the interpretation of the United States, and not of its treaty partner, that is controlling. "Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to it holds to a different view of its meaning." *Factor* v. *Laubenheimer, supra*, 290 U.S. at 298.

3. Petitioners further contend (Pet. 27–32) that the court of appeals based its judgment upon facts outside of the record, *viz.*, the Internal Revenue Service Manual, the commentary of the Model Treaty of the Organization for Economic Co-operation and Development (OECD), and the provisions of other tax treaties. As we have pointed out (*supra*, pp. 5–14), the decision of the court of appeals primarily rests upon the language, policy, and legislative history of the Tax Convention with Canada (Pet. App. A 5a–11a). But the Internal Revenue Service Manual, the OECD Model Treaty, and similar tax treaties considered by the court of appeals (Pet. App. A 11a–16a) were not "facts" outside of the record but legal authorities. It was therefore entirely proper for the court of appeals to look to these sources in construing the provisions of the Tax Convention with Canada.

Indeed, in determining the meaning of a treaty, this Court has considered the construction placed upon the treaty by the political departments of the governments responsible for its enforcement, the negotiations and legislative history of the treaty, the history and interpretation of similar provisions in other treaties, the meaning given to identical terms in the public international law and the decisions of foreign courts involving similar treaties, whether or not such materials had been presented to the lower courts. *Factor* v. *Laubenheimer, supra*, 290 U.S. at 294–295; *Charlton* v. *Kelly, supra*, 229 U.S. at 467–476; *Geofroy* v. *Riggs*, 133 U.S. 258, 271; *Wildenhus's Case*, 120 U.S. 1, 13–17.

4. Finally, petitioner Westward contends (Pet. 33–36) that the court of appeals erred in upholding the district court's refusal to permit it to intervene in this summons enforcement proceeding (Pet. App. A 17a). But, as the Court pointed out in *Donaldson* v. *United States*, 400 U.S. 517, 523, a taxpayer has no absolute right to intervene to bar production of records "in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer." See also *id.* at 530. Indeed, even if a criminal investigation of Westward had been in progress, the enforcement of the summonses compelling the production of bank and brokerage records would not have violated Westward's right under either the Fourth or Fifth Amendment. *United States* v. *Miller*, No. 74–1179, decided April 21, 1976, slip op.

8–9; *California Bankers Assn.* v. *Shultz,* 416 U.S. 21, 53; *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring). Thus, petitioner Westward possessed no interest that could have been vindicated by a challenge to the summonses. The court of appeals therefore correctly affirmed the district court's order denying Westward the right to intervene.

Petitioner Westward does not dispute the correctness of the foregoing authorities but argues (Pet. 35) that the decision below erroneously concluded that the district court had no discretion to permit it to intervene to challenge what it contends were unauthorized summonses. However, all the court of appeals held (Pet. App. A 17a) was that petitioner Westward had no cognizable interest in barring the production of the third-party bank and brokerage records sought by the summonses. Thus, under *Donaldson,* it could not intervene in the proceeding as a matter of right. In these circumstances, the district court properly exercised its discretion and refused to permit it to intervene. Moreover, as the court of appeals correctly observed (Pet. App. A 17a), "Westward was not prejudiced by the denial of intervention here, as its counsel admitted on argument of this appeal; it has been allowed to argue its cross-appeal and both Bank of Tokyo and Burbank have adopted its brief." [9]

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[9] Since the question of taxpayer intervention in a summons enforcement proceeding is a matter of discretion for the district court, the decision below does not conflict with *United States* v. *Lafko,* 520 F. 2d 622, 624 (C.A. 3), or *United States* v. *Wall Corp.,* 475 F. 2d 893, 895 (C.A.D.C.), in which the district courts permitted intervention.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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